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Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of Albert B.
Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
of Albert B. Shultz, Deceased, *et al.*,

Respondents.

BRIEF OF ALL RESPONDENTS EXCEPT EASTMAN,
DILLON & CO. IN OPPOSITION TO APPLICATION
FOR CERTIORARI.

HAROLD R. MEDINA,
LOUIS L. BABCOCK,
NOEL S. SYMONS,
MASON O. DAMON,
WILLIAM GILBERT,

Respondents' Counsel.



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Exhibits

The original exhibits in this case have been duly filed with the clerk of this court. In support of their application the plaintiffs have printed and are submitting certain of the exhibits. Accordingly the respondents are printing and submitting herewith under separate cover certain additional exhibits which are referred to in their briefs.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of ALBERT B.
SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COM-
PANY, Individually and as Co-Executor under the
Last Will of ALBERT B. SHULTZ, Deceased,
PERRY E. WURST, LEWIS G. HARRIMAN, FRED-
ERICK B. COOLEY, GEORGE H. CHISHOLM,
HARRY L. CHISHOLM, RALPH HOCHSTETTER,
ANSLEY W. SAWYER;

and

THOMAS C. EASTMAN, HERBERT L. DILLON,
HENRY L. BOGART, JR., GILMER SILER, In-
dividually as well as Co-Partners with JAMES P.
MAGILL and MAURICE H. BENT, doing business
under the firm name and style of Eastman, Dillon
& Company,

Respondents.

Consolidated
Causes.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of ALBERT B.
SHULTZ, Deceased,

Petitioners,

against

MANUFACTURERS & TRADERS TRUST COM-
PANY, as Co-Executor under the Last Will of
ALBERT B. SHULTZ, Deceased, THOMAS CANT-
WELL and GEORGE P. REA,

Respondents.

BRIEF OF ALL RESPONDENTS EXCEPT EASTMAN, DILLON & CO. IN OPPOSITION TO APPLICATION FOR CERTIORARI.

Statement.

Plaintiffs apply for certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit which unanimously affirmed a judgment of dismissal rendered after the trial before Burke, J., without

a jury, in the District Court for the Western District of New York of consolidated actions for the restitution of alleged secret profits flowing from asserted fraud in the acquisition and execution of an alleged agency, and for damages. The opinion of the Trial Court will be found at pages 177-202 of the record and is reported in 40 F. Supp. 675-687; the Findings of Fact and Conclusions of Law appear at pages 202-245 of the record; the opinions of the Circuit Court of Appeals appear at pages 2323-2347 and are reported in 128 Fed. (2d) 889.

Nature of Action.

Plaintiffs are two of the executors of Albert B. Shultz, president and former principal stockholder of Houde Engineering Corporation (Houde). The principal defendant is the third executor, Manufacturers & Traders Trust Company (the Bank), against whom, together with some thirty-four other individuals and firms named as defendants, a recovery in excess of \$10,000,000 was sought. Plaintiffs charged that at a time when the Bank was acting as commercial banker for Houde and was intimately acquainted with its financial circumstances, it entered into a conspiracy with other defendants herein to acquire control of that company and by sundry unlawful frauds and devices to cheat and defraud decedent and the other Houde stockholders into parting with their stock. It was said to have carried out this conspiracy by first inducing decedent and his co-stockholders to employ it as their agent; having acquired this agency it was claimed that the Bank proceeded to purchase the stock through a dummy, thereafter disposing of it at a large profit to itself and to its co-defendants. Plaintiffs sought recovery of this profit.

Defendants denied the agency, denied the alleged breach of agency, and asserted the statute of limitations. On all these issues defendants were sustained by the Trial Court.

The Petition.

Ignoring the Trial Court's findings and basing their argument on what the majority of the Circuit Court of Appeals have characterized as "a highly involved series of inferences, all against the direct findings of the Court", plaintiffs, in a petition as misleading and inaccurate as it is intemperate, launch an wholly unwarranted attack upon these defendants.

Taking an isolated phrase here, an unrelated expression there, selecting at random bits of testimony they consider favorable to their contention and completely ignoring the rest, plaintiffs attempt to piece together a story of fraud and misconduct which they present to this Court as based upon what they term the "undisputed facts". This is all with the avowed purpose of inviting review of this case on its merits, notwithstanding the fact that what is tendered by the petition is the very narrow question of the statute of limitations.

We are mindful of this Court's admonition that it will not grant certiorari "merely to review evidence or inferences drawn from it." (*General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, *U. S. v. Johnston*, 268 U. S. 220). Yet the challenge laid down by the petition is one we cannot ignore.

While none of the Findings of Fact in defendants' favor was disturbed by the Circuit Court of Appeals, the nature of the petition seems to us to make it necessary that we demonstrate not only that the determination concerning the statute of limitations was clearly correct, but also that

the findings of the Trial Court on the merits were amply supported by the evidence. That Judge Clark was completely satisfied of this appears from his opinion, in which Judge Swan concurred. Even a casual scrutiny of the record will make it plain that the doubts on the merits expressed by Judge Frank involved pure issues of veracity and credibility, which it was the peculiar province of the Trial Judge to resolve (F. R. C. P. 52).

Were it not for the garbled presentation of the case in the petition we should be content with respect to the merits merely to refer to the opinion and findings below, supplemented by a succinct argument addressed to the question of law relative to the plea of limitations. The character of the petition, however, seems to us to make it necessary to go somewhat further and discuss the evidence sufficiently to demonstrate that the findings are amply supported. This we shall therefore do, making every effort to keep the discussion as brief as is consistent with the extremely lengthy record, and following the same with a consideration of the questions of law which the application purports to present.

Summary of Facts.

Since the facts are so fully stated in the opinion and findings of the Trial Court, and in the opinion of Judge Clark, we shall only summarize them briefly, making such comments as we deem appropriate.

The Houdaille shock absorber was invented by Maurice Houdaille of Paris. Prior to December, 1918, decedent acquired the American patent rights to this invention and shortly thereafter organized Houde.

Long prior to the specific transactions involved in this case decedent and his associates in Houde had been trying to sell the company. These efforts go back as far as 1925, long before the Bank had any contact with Houde or its

affairs, and were due to a number of factors, among them being the highly competitive nature of the industry (P-105 a,¹ P-227, P-280a/c, P-468a; R. 723, 740), the company's record of steadily declining earnings (P-21, P-22), its unfavorable patent situation (P-19, P-27, P-109, P-280a/c; R. 1310, 1364, 1730-2) and its chronic lack of adequate working capital (R. 451, 500, 615, 730, 1085, 1095, 1209, 1306, 1341). The company had been offered to a number of companies and individuals, as, for instance, to Stewart Warner for \$2,400,000 and to Chrysler for \$3,000,000. They all declined to buy (P-27, P-29, P-30, P-31, P-33; R. 730-1, 1002, 1043, 1085-6, 1224, 1306, 1308, 1310).

In the early part of 1928 the company entered into a contract with the Ford Motor Company to supply it with shock absorbers on its new Model A car (P-24a/b), and as a result faced the problem of finding capital for plant expansion and equipment (P-114; R. 1308, 1722-9). It asked Rea, an officer of the Bank, to undertake a survey of its affairs for this purpose (R-557, 922, 1090-1, 1095-6, 1226-7). Such a survey was undertaken with the assistance of Central Trust of Chicago (a defendant here) and Eastman Dillon & Co. (another defendant here) and on its completion a proposal of refinancing was formulated (P-294; R. 927), but this proposal was not acceptable to the stockholders (R. 1384-5). As matters finally eventuated the Bank itself agreed to extend to the company whatever accommodation it needed to meet its working capital requirements, and appropriate loans for this purpose were thereupon granted (R. 733, 955, 1094).

In the period preceding the survey Eastman Dillon had been informed of the stockholders' desire to dispose of their holdings and on July 23rd wrote Rea stating that they had

¹ Exhibits are referred to as "P-1", "D-1", etc. Typographical emphasis throughout brief is ours.

discussed the matter with Timken-Detroit Axle Company of Detroit and that company had displayed "a very definite interest in Houde" (P-54). They asked Rea to obtain an "option" on the stock (R. 1475, 2059-60). Rea's first discussions on the subject were with decedent, but the latter soon thereafter departed on a business trip to Europe, leaving the matter of negotiating a sale in the hands of Chisholm, vice-president and substantial stockholder of Houde and decedent's financial adviser (R. 330, 395, 712).

On September 26th, following discussions among Rea, Chisholm and certain of the other stockholders, there was executed the instrument underlying this litigation. This instrument (P-98), prepared in its final form by Irving L. Fisk, Houde's attorney and attorney for decedent in this transaction, provided as follows:

"IN CONSIDERATION of \$1.00 receipt of which is hereby acknowledged, we the undersigned stockholders of the Houde Engineering Corporation, hereby give to Krauss & Company,² for a period thirty days from the date hereof, the right to purchase all the stock of the Houde Engineering Corporation at a price of (\$4,000,000) Four Million Dollars in total. This option can only be exercised by the payment of cash before its expiration.

It is understood that the net assets of the Houde Engineering Corporation, when, as, and if this **option shall be exercised** will be at least equivalent to the position as set forth in its balance sheet dated August 31st, 1928, and any accrual in these net assets occurring since the close of business August 31st, 1928 shall adhere to the **vendors in this option.**

² i. e. the Bank's nominee.

Inasmuch as Krauss and Company will act as a broker in this transaction, it is also understood that in the event of **the** sale of said stock being consummated Krauss and Company will be entitled to a commission from the purchase price of 3%.

If stockholders owning not more than a total of 265 shares of said stock, who do not sign this **option**, refuse to join in **the** sale at the price aforesaid, there shall be a reduction made in the purchase price of \$1,640.19 per share for each share of said stock which the undersigned shall be unable to deliver to the purchasers.

It is understood that the name of A. B. Shultz is signed hereto in pursuance of verbal authority given by him to negotiate a sale of said stock.

A. B. SHULTZ, by G. H. Chisholm
 GEORGE H. CHISHOLM, *V. Pres.*
 HARRY L. CHISHOLM, *Treas.*
 B. D. SHULTZ, *Secretary.*
 J. N. SCULLY, *V. P. Director.*"

It is this option which the Bank subsequently and on October 11th accepted in the following terms, to wit:

"Referring to the **option** dated September 26, 1928, which you have given us for the purchase of all of the stock of Houde Engineering Corporation, at a price of \$4,000,000.00, we beg to advise you that we have secured as a purchaser the New York Car Wheel Company, of this city, which has agreed to purchase said stock upon the terms of our option, and has made available in our hands the sum of \$4,000,000.00 therefor.

We accordingly notify you that we elect to exercise our option as of this date, and tender you payment in

full upon delivery to us of all the stock of the Houde Engineering Corporation, duly endorsed for transfer, less a possible maximum of 265 shares, all as provided in our option. We shall be glad to suit your convenience as to time and place of delivery, and payment prior to October 25th, and suggest that you promptly arrange with us for an early closing.”,

a copy of this acceptance being sent to decedent by registered mail and being received by him upon his return from Europe (R. 433).

On the trial plaintiffs claimed and sought to prove that before the option was signed, an understanding had been reached with the officials of the Bank that the Bank was to have no interest in the purchase and that the price mentioned therein was to be regarded as “minimum”. This claim was not sustained in any particular and was shown to be wholly without substance.

Rea testified that the only discussion at the meeting preceding the execution of the instrument of September 26th had to do with the granting of an option *to the Bank* (R. 1395). He stated that he informed the stockholders present “that it was essential that an option be given at a definite price” (R. 1389) and that they *all* expressed a willingness “to give an option” at the price of \$4,000,000, plus the accrued earnings (R. 1390). He said the stockholders themselves fixed the price at which they were willing to sell (R. 1443, 1451). He denied that there was any talk of agency (R. 1395).

Chisholm, decedent’s representative in the transaction, understood that what Rea wanted was an “option to *buy* the Houde stock” (R. 735). He testified that he thought the price of \$4,000,000 fair to both the stockholders and the purchaser (R. 1313). He said he didn’t care in the least

who bought the stock, whether "the Bank * * * or John Jones or General Motors" (R. 1001; and see R. 736, 1334). He stated that it was his understanding that the Bank was to receive the commission provided for "even if they bought it themselves" (R. 737).

Fisk, decedent's attorney, testifying concerning his conversations with his clients on the evening preceding the execution of the option, stated that the only price then mentioned to him was that contained "in the paper that they showed me, as the price for all of the stock" (R. 1522). In this connection he stated (R. 1523-4):

"Q. During that evening was any mention made by anyone of a minimum price? A. No. * * *

Q. Was anything said by either of these gentlemen who were there about the Bank not having any interest in the sale? A. No."

Significantly enough, Fisk's contemporaneous office charge slip covering his legal services on the evening of September 25th referred to such services as "revision of option" (P-494b).

And, lastly, Dave Shultz, decedent's brother and fellow stockholder, when questioned regarding his understanding of what the instrument of September 26th meant to him when he signed it, testified that it never entered his head that the Bank was "to act as agent" and that all he was interested in was getting his money (R. 429).

The foregoing should effectively put at rest any question as to the intention underlying the instrument of September 26th and what it was intended to accomplish. Were there any doubt on the subject, however, it is effectively dispelled by the language of the Bank's formal acceptance of October 11th (P-101), already considered. This letter, it will be recalled, expressly referred to "*the option* * * *

*which you have given us for the purchase of all the stock * * **. This letter informed decedent that "*we (the Bank) elect to exercise our option, as of this date, and tender you payment in full * * **all as provided in *our option*". This letter shows that the Bank (and nobody else) was pledging its responsibility to the Houde stockholders. It shows that the Bank (and nobody else) was making tender of payment. It shows how the *Bank* regarded the transaction and that it believed that it was accepting the option *according to its terms*. It is to be borne in mind that the transaction was later actually consummated *on the basis of this acceptance*, the accrued earnings provided for in **the option**, amounting to \$210,611.02 (P-117), being computed to October 11th, the date of the letter of acceptance, rather than to October 24th, the date on which the sale was closed.

Subsequent to the execution of the option Chisholm sent certain cablegrams to decedent in Europe. The language of one of these (P-105a) is relied upon by plaintiffs as spelling out a contract of agency between decedent and the Bank, it being claimed (Pet. p. 10) that this cablegram was "prepared (by Chisholm) after a discussion with Rea to formulate its contents." We do not deem it necessary to discuss this cablegram, the language of which was fully explained by Chisholm (R. 739-40), for the undisputed evidence shows, and the Trial Court found, that none of the defendants, except Chisholm himself, had anything whatever to do with its preparation and in fact had no knowledge or notice of its contents (R. 364, 408, 441, 609-11, 737-8, 743, 1321, 1324, 1381, 1394-5, 1397, 1447, 1449; Finding 52, R. 213).

Immediately after the execution of the option efforts were made to sell to the various companies with whom Buffington had been negotiating (P-391, P-392, P-393, P-

395, P-397, P-403; R. 1240, 1392). For various reasons all of these companies declined to buy (P-403). Rea also tried to interest Oishei, director of the Bank and president of Trico Products Company, but the latter, after having the Houde patents examined by a Buffalo patent attorney (P-109), informed Rea that he was not interested (R. 702, 1099-1100, 1102, 1690-2).

It was following this that the sale to Cooley was consummated. Cooley, president and controlling stockholder of New York Car Wheel Company, when approached by the Bank, was at first reluctant to buy because of the size of the undertaking, but finally agreed to do so when the officers of the Bank agreed to take the commitment off his hands in the event of his death or disability, and agreed to help him form a syndicate to take over a portion of the purchase if he determined upon this course as the best means of handling his commitment (R. 1102-3, 1401, 1799-1800, 1840). Upon these terms he committed himself to make the purchase and thereafter executed the purchase memorandum of October 11th, 1928 (P-112) embodying the terms of his understanding with the officers of the Bank. It was following the execution of this memorandum that the Bank sent its formal acceptance of its option to the stockholders.

We pause for a moment to consider the memorandum of October 11th (P-112), for this instrument is stated (Pet., pp. 3, 15) to underlie plaintiffs' claim of breach of agency in this case. Commenting on the provisions having to do with the formation of a syndicate to take over \$3,500,000 of the purchase, plaintiffs point to this instrument as evidence that the real buyer of the stock was not Cooley but the Bank.

This view not only misreads the provisions of the instrument itself, but utterly ignores the *undisputed* testimony concerning it.

The instrument recites an agreement on the part of the

Bank's officers personally to assume the commitment in the event of the death or disability of Cooley. The only provision concerning the formation of a syndicate is the statement of *Cooley's* intention to form such a syndicate with the assistance of the officers of the Bank. There is absolutely no provision by which Cooley yields any part of his purchase to the Bank or gives either the Bank or its officers any interest whatever in the stock.

Upon the present trial all those who had been parties to this document testified as to the intention underlying it. They testified that so far as the instrument referred to a syndicate, it was a syndicate to be formed *solely* at Cooley's election and not otherwise (R. 510, 1112, 1252, 1401, 1800). This was in conformity with the testimony given concerning this instrument in the prior lawsuits involving these transactions. In the *Chisholm* tax case, long before any of these suits were instituted, Wurst testified that the underwriting group referred to in the memorandum of October 11th was to be formed only if Cooley "wanted to" (R. 460; and see R. 457). In the *Goetz* case in 1935 Rea also testified regarding this instrument and stated that "There was no obligation to form a syndicate" and that it was to be formed only "if Mr. Cooley desired it" (R. 510).

Under the memorandum of October 11th neither the Bank nor its officers acquired any interest whatever in Cooley's purchase. This memorandum was just what the witnesses said it was, an inducement to Cooley to purchase consisting of promises of assistance by the Bank's officers if Cooley wanted such assistance. It did not contain a single promise as to the disposition of his purchase running from Cooley to the others, except in the event of Cooley's death or disability. *All the covenants ran the other way, from the officers of the Bank to Cooley.* The instrument

gave Cooley the right to call on the officers for assistance if he wanted it; it gave *them* no right to compel *him* to do anything. Cooley so understood it (R. 1840); so did the others (R. 1112, 1252, 1401, 1924-5).

The assurances given by the Bank's officers in the memorandum of October 11th were personal, and were extended in order to bring about a sale of the stock where prior efforts to that end had failed. Without these assurances a sale could not have been consummated.

After buying the stock Cooley immediately undertook, through the offices of Oishei, to interest General Motors. Certain representatives of that company came to Buffalo on October 12th, but after looking into the matter informed Cooley that they thought he had paid too much and that they could see no value in excess of \$3,500,000 (Findings 78-80; R. 218-9, 776, 1004, 1116-7, 1255, 1806-8). The charge that *prior* to the sale to Cooley, General Motors had made an offer in excess of the option price, emanating from certain testimony given by Wurst in the *Chisholm* tax case (R. 460),^{2a} was conclusively exploded on the trial. It was Cooley who tried to interest General Motors, and the date of the conference with their representatives was definitely fixed by a mass of documentary evidence including the Guest Register of The Buffalo Club as being on October 12th, *after* Cooley agreed to buy (D-49, P-225, P-249a to P-250c, P-372, P-374).

^{2a} This testimony constitutes one of the so-called "admissions" upon which the present petition is predicated. Wurst's testimony in the *Chisholm* tax case was patently erroneous, as shown by his testimony on the present trial (R. 1930-2). Based on all the evidence the Trial Court made an express finding rejecting plaintiffs' claims in regard to this matter (Finding 79; R. 218). The subject had been previously explored in the action of the other stockholders. In that case the claim with regard to an alleged General Motors offer was shown to be so thoroughly without substance that it was withdrawn in its entirety before the close of the trial (Record on Appeal, 254 App. Div. 128; fols. 1649-50).

The result of the General Motors negotiations had made it quite evident that the prospects of a resale were not good, that Cooley probably would wish to call on the services of the Bank's officers, and that their heavy contingent liability in the event of his death or disability would continue for a substantial period of time. It was in the light of these facts that Cooley signed what has in this litigation been referred to as the declaration of October 13th (P-113). This is the document by which Cooley stated his intention to share with the officers of the Bank any profits he might realize from his commitment as a result of the following two contingencies, viz.: (1) If anything later developed from the General Motors negotiations, and (2) if he decided to form a syndicate and any profit resulted therefrom.

At the time this declaration was executed Cooley had already committed himself to the purchase. In this document he was merely speaking of what he "expected" to or "might" do if certain possibilities eventuated.

Upon the trial herein, plaintiffs sought to prove not only that this declaration was an "agreement", but that it was part and parcel of Cooley's *prior* agreement to purchase. As lending support to this claim it was suggested that this declaration must in fact have been executed on October 10th or 11th when Cooley made his agreement to purchase. There was not a scintilla of evidence adduced to substantiate this claim and it was summarily rejected by the Trial Court (Finding 88; R. 222), who had indisputable evidence of its falsity in a copy of the document annexed to an income tax examiner's report made long before there was any thought of litigation (R. 1981; and see R. 1008, 1118 *et seq.*, 1808 *et seq.*, 1933 *et seq.*). The undisputed testimony shows that the instrument was in fact prepared

and signed on the day it bears date (R. 606, 747, 759, 1008, 1118 *et seq.*, 1196, 1199, 1809, 1934 *et seq.*, 1980, 1981), and the Trial Court so found (Findings 88, 89; R. 222).

In the period following his purchase Cooley considered many different alternative plans including operation of the company, formation of a syndicate and a possible public financing (R. 787, 792, 816, 819, 850-3, 1122-3, 1409-10, 1816-17). During this period Cooley went to the plant and assumed the active management of the company (D-28; R. 384, 981, 1735, 1736 *et seq.*, 1774, 1819-20, 1823, 2208-9). He was introduced at the plant as the "new boss" (R. 1297).

Decedent returned from Europe on October 18th (R. 383), was disturbed when he heard of the negotiations with General Motors, Ford's principal competitor, but was entirely satisfied when informed that Cooley, not General Motors, had bought (R. 348-9, 377). Upon his return decedent learned of a claim that was being made against him by two of his co-stockholders (the Scullys), who were demanding more money for their stock by claiming that certain of the stock had originally been improperly issued to decedent (R. 800). So anxious was decedent to have the sale go through that he authorized Fisk, his attorney, to pay \$100,000 to settle this claim, and Fisk thereafter settled it with the Scullys for \$50,000 (P-119 a to 125, P-494c; R. 1938). Plaintiffs imply (Pet. p. 16) that decedent later delivered his stock under compulsion and under threat of some kind of litigation. We know of nothing to justify this assertion nor does it find the slightest support in the record.

The actual closing of the sale occurred on October 24th. On the closing decedent was represented by his attorney, Fisk (P-494a), who had previously revised and approved the option of September 26th on his behalf (P-494b). The stock was delivered and payment was made upon the basis of receipts which referred specifically to the instrument of

September 26th as an "option" (P-116b, P-129, P-130, P-135, P-137). Upon the consummation of the sale decedent signed two duplicate receipts (P-139, P-542). These differed from those signed by the other stockholders because they covered only part payment for decedent's stock, decedent and Cooley having previously agreed to defer the balance under an arrangement which yielded decedent interest on the unpaid amount (R. 1131-2; 1812-3). One of these receipts contained the undertaking of the Bank guaranteeing the payment of this balance (P-542). This, taken in conjunction with Wurst's testimony of his conversation with decedent at the time the receipt was delivered (R. 1948-91),³ shows beyond all doubt that decedent knew that the Bank was financing Cooley's purchase of his stock, and the Trial Court so found (Finding 31; R. 227). Decedent likewise knew that Cooley was a director of the bank (Finding 131; R. 227).

At the time Cooley agreed to buy, Harriman, on behalf of the Bank, agreed to loan the money to Cooley provided the latter put up adequate collateral for that purpose. The suggestion of \$600,000, plus the Houde stock, was entirely acceptable to Cooley, and the loan was made on this basis (R. 544, 550, 1104, 1926). The loan to Cooley was formally approved both by the Bank's Executive Committee and by the full Board of Directors (D-1, D-30). It was set forth in the statements of transactions submitted at these meetings,

³ Upon the trial the plaintiffs insisted upon a strict compliance with Section 347 of the New York Civil Practice Act (the so-called "dead man statute" excluding evidence of transactions with a decedent unless opened by the executors). This was the only occasion throughout the entire trial that any defendant was permitted to testify to any conversation with decedent, the Trial Court having ruled that in this instance the "door had been opened" by the plaintiffs. The naming of so many defendants in this case was obviously to seal their lips under this Section. For comment on the inequity which this statute works because of the extent to which it prevents a full disclosure of the facts, see *Dellefeld v. Blockdel Realty Co.*, 2 Cir., 128 F. (2d) 85.

together with the market value of the personal securities put up by Cooley which, aside from the Houde stock, aggregated \$637,909 (P-167a/b, P-168a/b). Upon all the evidence the Court found that the Bank's loan to Cooley was a *bona fide* one (Findings 121-125; R. 226). The Court also found that Cooley was a wealthy man, amply able to respond to his obligations (Finding 125; R. 226).

Included among the numerous financing plans considered by Cooley following his purchase were at least two that contemplated the sale of stock in a new company to decedent (P-240, P-241). One of the important provisions of the receipts signed by decedent in connection with the closing of October 24th was that decedent was to be "permitted to take stock of a new corporation in part payment of the balance" of the purchase price (P-139, P-542). Indeed, he had previously executed an affidavit (P-332a) for the purpose of qualifying in New York State a corporation which Cooley had caused to be organized in Delaware as one of his many plans for the handling of his committment. These various acts of decedent show not only decedent's knowledge and complete familiarity with Cooley's plans regarding his purchase, but also decedent's active participation in these plans.

On or about November 1st, following receipt of a letter from Eastman Dillon advising of the latter's unwillingness to undertake any public financing at that time (P-74), Cooley decided definitely to go ahead with his plan to form a syndicate and a syndicate or underwriting agreement to put this plan into effect was prepared. This syndicate differed substantially from that contemplated in the memorandum of October 11th (P-112). The latter was to relieve Cooley of a *portion* of the purchase price at his election. The syndicate actually formed took the *entire* commitment from Cooley at his (Cooley's) cost, leaving him with 25%

of any profit that might be realized. This 25%, under the terms of the underwriting agreement (P-335, P-336), was payable to Cooley or his "assigns."

At the time this syndicate was formed there was no prospect of a resale and no purchaser in sight (R. 994, 1060). On the contrary, as shown by the contemporaneous correspondence (P-75, P-86), it was Cooley's then intention to operate the company. The provisions of the syndicate agreement itself make this abundantly clear.

The opportunity to participate in the syndicate was extended to the Directors of the Bank at an informal meeting held on November 7th. Many joined; others, including Oishei, to whom the stock had previously been offered for sale, did not (R. 595, 1707). Plaintiffs complain of the fact (Pet., p. 20) that twenty-three of the twenty-seven individual allottees were officers or directors of the Bank. Harri-man testified that the reason the invitation to prospective purchasers was confined substantially to the directors of the Bank was because they were men capable of gauging the risk involved. If a large number of outsiders had been invited into the underwriting and it turned out badly, this might have offended good friends and customers of the Bank. If, on the other hand, it proved successful, this might easily have created a feeling that many additional people should have been invited who were not invited (R. 1161-2).

Among those who participated in the syndicate were decedent and the Chisholms, owners of approximately 70% of the Houde stock. Decedent subscribed \$250,000, and was allotted the full amount of his subscription (P-193a, D-4). They were not the only stockholders who knew of the syndicate. Dave Shultz knew of it and of the fact that his brother and the Chisholms had gone into it (R. 385-6). Jim Scully likewise knew about it; *he* tried to get a participation in it but was not allowed to when decedent objected because of their previous altercation (R. 345-8).

At the time decedent joined the syndicate he knew that the purchaser of the stock and the person from whom the syndicate was acquiring the commitment was a director of the Bank. He knew that such purchaser had been financed in his purchase by the Bank. He knew that when the syndicate took over the commitment from Cooley it was at *his* (Cooley's) cost. Moreover, as a member of the syndicate, he knew who his co-participants were and that the Bank and numerous of its officers and directors had taken shares in the underwriting. This was long before decedent was paid in full for his stock on the original sale and, therefore, long before the sale, as to him, was fully consummated. In short, if the Bank was an agent decedent knew that it and its officers were acquiring an interest in the subject matter of the agency. His participation in the syndicate *was with this knowledge*.

It was under circumstances not important here that the syndicate of which we speak quite unexpectedly some three weeks later found an opportunity to resell the stock to Harris Small at a price of \$6,000,000 (P-74, P-75, P-77, P-78, P-421, Ex. B to Cpts., P-182). Decedent's profit as a syndicate participant was \$76,942.39 (D-41). At the very time he received this payment he likewise received from the syndicate managers the unpaid balance due him upon the original sale (P-139, P-140, D-41, D-50).

Plaintiffs assert (Pet. p. 21) that the Chisholms were "secret" participants in the syndicate. This is not true. The Chisholms took a portion of one of two subscriptions made by their business associate, Wyckoff (R. 1330-1). This was not done until long after decedent's return from Europe. Far from being "secret", this participation was known even to decedent's brother, Dave Shultz, who was *not* a participant (R. 385-6). Plaintiffs also allude (Pet. pp. 24-5) to the alleged "secret" methods employed by

Cooley for the division of his syndicate profit, commenting on the fact that these payments were made by cashier's checks on a New York bank. As the testimony shows, these payments were made in this fashion for the sole purpose of avoiding gossip and bad feeling in the Bank, it being the uniform practice in that institution at that time to make all salary and bonus payments in cash to preserve the privacy to which officers and employees were alike entitled (R. 2005). These payments, moreover, were duly reported to the Executive Committee of the Bank's Board of Directors at a meeting held on December 12th, 1928 (R. 1175; and see Finding 202, R. 239). No more relevant to the issue, nor any more warranted in fact, are the grossly unfair, and but thinly veiled insinuations as to the so-called "tax avoidance" measures taken by certain of the defendants in connection with their profits from the syndicate (Pet. pp. 21, 22). Such measures as such defendants took to minimize their income tax liability were taken pursuant to law, and no suggestion has or can be made that these measures constituted any violation of law. It were perhaps as relevant to point out that when decedent returned from Europe he, too, consulted his attorney and tax expert in order to minimize his own tax liability on the sale of his stock to Cooley (P-494a, R. 1537-8); yet, how any of this bears upon the simple issues in this case is not apparent.

Since these defendants had no connection with the ensuing events, our reference to what occurred after the sale to Harris Small will be brief. The reason for the purchase by Harris Small was that that company and its associates were dealing in the stock of automotive companies with a view to their ultimate merger (R. 676). They had been singularly successful in financing of this character, having previously been instrumental in the acquisition and

financing of Oakes Products Corporation and Hershey Corporation respectively. After acquiring the Houde stock, they effected a merger of that company with other companies previously acquired, and these were ultimately consolidated into the present Houdaille-Hershey Corporation (D-72; R. 1627, 1787). The stock of the new company thereafter experienced a substantial rise on the Chicago Stock Exchange. Its fate following the market collapse of October, 1929 does not appear in the record, as defendants' offers of proof in this regard were excluded by the Trial Court.

Decedent, said the Trial Court, was "the only one who participated in all the Houde transactions" (R. 201). Although the sale to Harris Small ended the Houde transactions so far as the Bank and its officers and Cooley were concerned, decedent himself continued on in the new organization and became closely identified with the new purchasers. On December 11th he presided at a meeting of Houde's directors at which certain of the new purchasers and their representatives were elected directors (D-52). From Harris Small, one of the firms which participated in the public offering, he purchased a thousand units of the new stock (D-36, P-268b). In his further transactions in this stock he made an additional profit of \$25,737.50 (P-266). He continued as Houde's president and his salary was increased to \$25,000 a year (R-1629). He was elected a director and vice-president of the new corporation and as such attended numerous of its directors' meetings (R. 1627 *et seq.*). For several years he corresponded with Barnes, president of the new company, on the most friendly terms. (P-200, D-53, D-54, D-67, D-68, D-69, D-70, D-71). Never, by word or conduct, did decedent express the slightest dissatisfaction over the sale of his stock or breathe a word concerning the various alleged frauds which his per-

sonal representatives now maintain were practiced upon him. A year or two after he sold his stock he tried to interest the directors of the Bank in forming another syndicate to acquire the stock of a new venture in which he was interested (D-70, D-71; R. 1177, 1688-9).

The transactions underlying this controversy occurred in the latter part of 1928. The first of these consolidated actions was not instituted until September, 1938, almost ten years later.

The Issues Before the Trial Court.

Upon the evidence before it, the Trial Court had three main questions for determination:

1. Was there an agency?
2. If so, did defendants' conduct constitute a violation thereof?
3. Was the action instituted within the time limited by statute?

In disposing of the first two of these questions, the Trial Court made very complete and extensive findings of fact, including specific findings that the instrument of September 26th was an option, that the purchase of the stock by Cooley was a *bona fide* purchase, that no misrepresentations were made and that none of the defendants was guilty of any fraud or deceit, or was engaged in any conspiracy to defraud decedent. If these findings were supported by the evidence, they of course constitute a conclusive answer to this litigation (F. R. C. P. 52).

In considering the foregoing findings this Court will not, as we understand it, review the weight of the evidence, but "so far as there is any testimony consistent with the findings, it (the testimony) must be treated as unasailable" (*Adamson v. Gilliland*, 242 U. S. 350). Findings supported by "substantial" or "ample" evidence will not

be disturbed (*Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251, *Mechanics Universal Joint Co. v. Culhane*, 299 U. S. 51). As stated in *U. S. v. United Shoe Machine Co. of N. J.*, 247 U. S. 32:

"The contentions could not well be more antagonistic, upon each of which there was conflicting testimony, and the important fact is to be borne in mind that it was given in open court * * *. The fact justifies deference to the findings of the trial court."

1.

Agency.

At page 5 of their petition, plaintiffs concede that if there never was any fiduciary relationship between decedent and the Bank, the basis for these suits is eliminated. In other words, if there was an option duly exercised, there is no need for further inquiry.

It was contended by defendants that the instrument of September 26th (P-98) and the Bank's acceptance of October 11th (P-101), together with the Bank's performance thereunder, constituted the acceptance of an option as a matter of law and excluded any question of agency. On the first appeal in the prior action of the minority stockholders the Appellate Division of the New York Supreme Court held that the instrument of September 26th was ambiguous and that it was error for the Trial Court to reject testimony which might resolve that ambiguity (249 App. Div. 88). Upon the trial below, Judge Burke, over the objection of defendants and following the decision of the Appellate Division, ruled that such testimony was proper and permitted plaintiffs' counsel to offer proof of all the surrounding and collateral facts which it was asserted bore upon the interpretation of the underlying instru-

ments. That was plaintiffs' insistent claim and it was adopted by the Trial Court. The case was tried upon that theory. Many hundreds of pages of testimony were devoted to this investigation. The construction of these written instruments, therefore, became a mixed question of law and fact. If a jury had been present, the question of the understanding and belief of the parties as to the nature and legal effect of the instruments and the facts surrounding their execution would have been submitted to it as a question of fact. The determination of the jury, if properly supported, would have been conclusive. Here the Court determined this question of fact, and the same rule of finality, of course, applies.

In the case of *First National Bank v. Dana*, 79 N. Y. 108, at page 116, the Court said:

"While it is the province of the court to construe contracts, yet where the meaning is obscure and depends upon facts *aliunde* in connection with the written language, very much must be left to the jury. (Phil. on Ev. [Cow. & H's. notes], 1420; *Gardner v. Clark*, 17 Barb., 551; *Etting v. Bank of U. S.*, 11 Wheat., 59; *Jennings v. Sherwood*, 8 Conn., 122.) Within this rule the case should have been submitted to the jury by the judge; and it was error to direct a verdict for the plaintiff."

In *Kenyon v. K. T. & M. M. A. Assn.*, 122 N. Y. 247, at page 254, an able judge states the rule as follows:

"The question, therefore, arises whether or not it was for the court to determine the interpretation to be given to the statement so written in the application, and to hold as matter of law that it was untrue and constituted a breach of warranty. It may preliminarily be observed that, as a general rule, the construction of a written instrument is a question of law for the

court to determine, but when the language employed is not free from ambiguity, or when it is equivocal and its interpretation depends upon the sense in which the words were used in view of the subject to which they relate, the relation of the parties and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact. (*White v. Hoyt*, 73 N. Y. 505; *Dwight v. G. L. Ins. Co.*, 103 *id.* 341.)”

See also:

West v. Smith, 101 U. S. 263:

Hoffman v. American Mills Co., 288 F. 768 (2 Cir.);
cert. denied 263 U. S. 701;

Williston on Contracts (Rev. Ed.), Vol. 3, §616.

The District Court, after reviewing the evidence, decided this question of fact in favor of the defendants. We set out two of the findings of fact (R. 210, 217):

“40. The oral testimony admitted to resolve the ambiguity on the face of the foregoing instrument establishes that it was intended to be an option fixing a definite price for the stock and which left nothing to the discretion or judgment of the Bank.”

“71. All the parties, including decedent, believed and understood that these instruments constituted an option and its acceptance and that they created a mutually binding contract between the stockholders and the Bank and the instruments were so interpreted by the parties thereto.”

There can be no claim that there was insufficient evidence to support these findings.

A perusal of Judge Burke’s opinion will disclose that he gave this issue his careful consideration. He says (R. 196):

“ . . . The evidence fairly demonstrates that the Bank and the stockholders, including decedent, regarded the sale to Cooley as one made under the definite terms of an option to purchase given by the stockholders to Krauss & Company and that when the option was given the stockholders intended that the price and terms fixed therein were final and definite, and that no other price or terms were to be used in attempting to negotiate a sale.”

Plaintiffs' counsel avoid discussion of this simple and pivotal question which lies at the very threshold of this application. We submit it is decisive in defendants' favor, for even if this Court declines to accept our contention that the instruments to which we have referred of themselves comprised an option and its acceptance, the decision of the question of fact as to what all the parties, including the decedent himself, really intended, binds the plaintiffs. If all of them understood and intended that the writings constituted an option and acted under it, that ends the litigation. It is practically undisputed that this was the fact.

On the question of the intent underlying the instrument of September 26th, the Court had before it the testimony of numerous witnesses. Specifically:

There was the testimony of those who participated in the early negotiations preceding the preparation of the instrument, to wit, Buffington, Cortelyou and Rea. Each of these was thinking unmistakably in terms of “option” or “definite price.” Buffington suggested originally that the Bank “obtain an option from the stockholders . . .,” the reason being that Mr. Glover of the Timken Company “wanted to know a definite price at which he could purchase the business, if he was interested, for a given period of time . . .” (R. 2059-60; and see R. 942). Rea con-

curred (R. 1387-8), adding that the purpose "of procuring the option" was to have some evidence of good faith on the part of the sellers and because "it was necessary to have an instrument on which we could work and rely" (R. 1474). Cortelyou testified that the possibility of negotiating in a case of this character depended on having an "option" or a "call" or "some kind of control" of the stock (R. 943). He stated that instruments of this kind are usually reduced to writing (R. 944), that he understood the instrument in this case to be "an option for the *purchase* at a certain price" (R. 945) and that it was quite usual in a case of this kind for a commission to be paid *either* if the option is exercised *or* if the stock is sold (R. 945-7). This evidence as to custom in a transaction of this character stood undisputed, the plaintiffs having produced no evidence to the contrary.

Then there was the testimony of those who actively took part in the negotiations of September 25th, to wit, Rea, Chisholm, Dave Shultz, Scully and Fisk. This includes the testimony of the *only* two men who represented decedent in the transaction, namely Chisholm and Fisk. We have reviewed the testimony of these witnesses. As pointed out, Chisholm clearly thought that he and the other stockholders were granting an instrument which gave the Bank itself "*the right to purchase*" (R. 736, 1001, 1334). Rea, of course, thought likewise (R. 1387-8, 1389-90, 1453, 1474). Scully was the stockholder who was bargaining for a "better" price, it being at his instance that the clause adding the accrued earnings was inserted in the option (R. 573), a provision wholly unnecessary if the Bank was supposed to get the "best price" it could. Dave Shultz cared not at all who bought the stock—or in fact about anything else as long as he got his money (R. 424-30). And Fisk, decedent's attorney, viewed the matter in the same light (P-

123, P-494b, R. 1523-4), representing decedent in the closing of the transaction on this basis.

Lastly, we have the testimony of those who took part in the discussions and negotiations *after* the instrument was executed. Cooley, for instance, clearly understood that he was buying the stock under an option. He testified that when Rea first approached him he told him that the Bank had "an option on the stock" (R. 1797; and see R. 779). He recalled that in the discussions of October 10th and 11th it was decided that "we must take up this *option*—send out notice taking up this *option*" (R. 1810; and see R. 799). Oishei and Sawyer both understood that the Bank had an option and remembered that the conversations during this period dealt with it in this way (R. 808, 1678, 1690). It is significant that upon the first trial of the Minority Stockholders' Action, Mills, attorney for the stockholders, admitted that under the first paragraph of the instrument the Bank did have the right to purchase, stating "I concede that the Bank could have bought, if they wished, under the first paragraph" (R. 273).

Having in mind the above testimony it seems clear, beyond any reasonable doubt, that all of the parties regarded the transaction as involving an option fixing a definite price at which the stock could be purchased and acted on this understanding. This intent is clearly manifested in the documents themselves.

In reaching his determination on the question of agency, Judge Burke had before him not only the option itself (P-98), but also the Bank's acceptance of October 11th (P-101), the correspondence preceding the execution of the option (P-57, P-61, P-62, P-389, P-436, P-520), the various writings incident to the consummation of the sale (P-116b, P-120, P-121, P-123, P-139, P-542, D-41), and a host of other documents (see, for instance, P-85, P-86, P-112, P-113, P-

393, P-395, P-494b). These, without exception, refer to an "option";⁴ certain of them go further and expressly refer to "an option to purchase" (P-112, P-113), and to an option which had been "assigned" (P-123). Significant among these is the Bank's letter of acceptance of October 11th (P-101). By this writing the Bank not only expressed its belief that it had an option, but also undertook to exercise that option by committing *itself* to the payment of the price therein stipulated. It thus unmistakably indicated its understanding of its arrangement with the stockholders. That the transaction was subsequently closed on this basis, coupled with the fact that the accrued earnings provided for in the option were computed to October 11th, the date of the Bank's acceptance, rather than to October 24th, the date of payment, indicates that the stockholders acquiesced in the Bank's understanding and considered that a binding contract had been concluded on the earlier date.

If there were, therefore, the slightest doubt as to what was intended in the relationship between the parties during the conversations dealing with the sale of the Houde stock, the parties themselves gave to this contract their own practical construction of its terms. The parties were thinking, talking, and, more important, *writing* in terms of an option. The transaction was closed on this basis.

While in affirming the judgment below the Circuit Court of Appeals expressed the view that its determination should follow the "more narrow" lines of the statute of limitations, Judge Clark left little doubt of his position on the question of agency, expressing full agreement with the Trial Court's findings. On this issue Judge Frank differed from his colleague, assigning three reasons.

⁴Under the law of New York State an option is legally defined "as an exclusive privilege to buy * * *" (Farone v. Hall, 128 Misc. 794, 796).

He refers, first to the testimony given by the defendant Wurst in the so-called *Chisholm* tax litigation, some five years after the present transactions. The inferences sought to be drawn from this testimony are not justified. Wurst had had no part in the negotiations leading to the execution of the option. Testifying many years after the event, and on extremely short notice and without an opportunity to refresh his recollection of the facts (R. 1931), Wurst's testimony in the *Chisholm* case indicates that he was testifying, not on the basis of any documents he had then examined or upon a refreshed recollection of the facts, but on the basis of surmise and recollection of events that had transpired many years before. His testimony is replete with such statements as "I have forgotten," "I am not positive", "I don't recall", "I don't recollect", "I can't tell you without looking," "my recollection is vague", etc. (R. 453, 456, 457, 489). During that testimony he referred to the Bank as the "real optionee"; he referred to the instrument of September 26th and to the Bank's letter of acceptance of October 11th as the "contract" under which the Bank acquired the stock (R. 454, 458-9). While in one breath he said he thought the instrument was obtained as agent for the sellers, in another breath he said "We were not acting as agents for anybody" (R. 459). Still again, when questioned as to whom the Bank was acting for, he replied "I never could figure out" (R. 470). He said "We obtained the option and paid for it * * * " (R. 420). He said the Bank "*took this option* in the name of Krauss & Company as its nominee" (R. 454). And while he stated that the question arose as to whether or not the Bank could exercise the option upon the theory that it could not be both a principal and an agent (R. 475), he explained this testimony upon the present trial by stating that this was merely a test which he applied in his own mind and that

he asked Rea at the time and the latter informed him that "There wasn't the slightest doubt in his mind or in the mind of the parties who gave it, but that it was an absolute option, and I accepted it as an absolute option to the best of my ability" (R. 1993). The letter accepting the option which he subsequently prepared (P-101) bears this out.

Wurst testified on the present trial and was examined and cross-examined for many hours, not only with respect to the various transactions underlying this litigation, but also as to his prior testimony involving these transactions. This applies to the other defendants as well. His credibility, as also the credibility of the numerous other witnesses who testified, was entirely a question for the Trial Court. That question has been completely disposed of by the findings.

Judge Frank refers, in the second place, to certain alleged testimony to the effect that at the time a resale to General Motors was being discussed the Bank's officers were "worried" over decedent's attitude; it is argued they would not have been worried had they regarded themselves as entitled to purchase. We are aware of no testimony indicating that defendants were ever "worried" to the slightest degree over decedent's attitude toward a sale to General Motors. When decedent returned from Europe he was concerned over an understanding that such a sale had been made. When he visited the Bank he inquired as to whether that understanding was true. He was told that it was not and that Cooley had bought. The Bank was merely informing decedent what the facts were, and this is all that the evidence establishes (R. 348-9, 377).

Judge Frank argues, in the third place, that no valid "option" for the purchase of the Houde stock could have been acquired by the Bank since such an option would have been in violation of the New York Banking Law (§190 (10))

now §103.) Judge Frank was laboring under a mistaken view of the statute. What the Banking Law prohibited in 1928 was the "investment" by a trust company of more than a certain percentage of its capital and surplus in the stock of private corporations. The taking of an option to buy, a practice followed by all banks and trust companies at the time of these transactions, constituted no such "investment". The Bank never contemplated buying or intended to retain any substantial portion of the Houde stock (R. 482) and when it sent its letter of acceptance of October 11th had already disposed of the commitment in its entirety. The Bank and its securities affiliate later took a total participation of \$1,000,000 in the syndicate which Cooley formed. Since the Bank's capital at this time, consisting of its capital, surplus and undivided profits, amounted to approximately \$18,000,000 (P-591), this obviously was well within the limits of the provisions of the Banking Law referred to by Judge Frank and constituted no violation of that statute.

As shown, the Trial Court had no alternative but to reach the determination it did on the basis of the testimony before it. We go further and state that such determination would have been amply justified even without the benefit of such testimony. The nub of plaintiffs' case on the issue of agency is the fact that the third paragraph of the option provided for the payment of a commission and that such a commission was in fact collected.⁵ There is nothing strange or unusual about a contract which gives an

⁵ The payment of a commission does not of itself necessarily imply fiduciary obligations (Restatement, Agency, § 13, Note 6), particularly where the seller fixes the price and terms of sale (*Gracie v. Stevens*, 56 App. Div. 203, 207, aff'd 171 N. Y. 658. *Knauss v. K. B. Co.*, 142 N. Y. 70). An agent may, of course, if it is so understood, "deal on his own account" (Restatement, Agency, §§ 389, 390). "There is no inconsistency in a contract which creates an agency to sell and also gives the agent an option to purchase" (2 Corp. Jur. Sec. 1034).

option and at the same time allows the optionee a commission if it is exercised. The parties can, of course, put their bargain into any form they choose. Construing an instrument in every respect similar to the one here involved the English Privy Council in *Kelly v. Enderton*, L.R.A.C. 1913, p. 191, said:

“Their Lordships are unable to accede to this contention (viz. that the instrument created an agency). The option to Enderton to buy is given in plain and unequivocal terms, and it would require to be shown that the subsequent clause as to commission was necessarily inconsistent with an option to buy to induce them to construe the clause in other than its natural way. But where is the inconsistency? It seems a quite natural thing to say ‘You are to have an allowance of commission of one thousand dollars for finding a purchaser who is able to pay the twenty-five thousand cash and come under the further obligations, and that whether you are yourselves the purchasers or you give the benefit of the option to another purchaser’.”

And as further stated in *Fitzgerald v. Boyle*, 57 Utah 234, 238-9:

“Taking the contract as a whole and giving effect to all of its provisions, we are unable to avoid the conclusion that the intention of the parties clearly was to give plaintiff a right to sell on commission, and also, at the same time, to give him the right to purchase for himself. • • •

The remaining question is whether plaintiff was entitled to a commission when he himself became the purchaser. If he had procured a customer who had purchased, plaintiff would have been entitled to a commission, and defendants would have received the \$3,000, less the commission. They are in exactly the position

financially that they would have occupied in case of any other sale made for them by plaintiff, and that thought may explain why the agreement provided for a commission in the event of either purchase or sale."

The meaning assigned to the instrument of September 26th by the Trial Court was not only the only construction that could be given it under the testimony, but was also the manner in which this very instrument had been construed in earlier cognate litigation. For instance, in the *Chisholm* tax case, the Circuit Court of Appeals for the Second Circuit (79 Fed. (2d) 14, cert. den. 296 U. S. 641) referred to the instrument as a "thirty days' option"; in the *Goetz* case (248 App. Div. 665), Judge Lytle referred to it as "a thirty day option * * * to purchase", and referred to the Bank's letter of October 11th as "the exercise and acceptance of said option * * * ". Upon the first trial of the Minority Stockholders' Action Judge James granted the Bank's motion for a nonsuit upon the ground that the instrument was "an option" which was "complete in itself, containing all the necessary elements, since it specified the purchase price and terms of payment." While upon the subsequent appeal in that case the Appellate Division was of the view that the instrument created a "form" of agency, this was solely on the basis of plaintiffs' testimony, the Bank having rested at the close of plaintiffs' case upon plaintiffs' evidence. In that case the Appellate Division held that no proof of breach of agency had been adduced and affirmed the judgment of dismissal. The dismissal of plaintiffs' case as a matter of law was thereafter unanimously affirmed without opinion by the Court of Appeals of the State of New York (*Shultz, et al. v. Manufacturers & Traders Trust Co.*, 279 N. Y. 781).

Clearly, as between a construction imputing bad faith and one imputing innocence, the Trial Court had little alterna-

tive but to accept the latter (*Simon v. Etgen*, 213 N. Y. 589, 595; *Campbell v. State*, 240 App. Div. 304, 309), especially as the instrument had been drawn in its final form by the attorney for decedent and was therefore to be construed against plaintiffs (*Taylor v. U. S. Casualty Co.*, 269 N. Y. 360; *Evelyn Building Corp. v. City of New York*, 257 N. Y. 501; *Thieler v. Trinity Advertising Corp.*, 241 App. Div. 34, aff'd 265 N. Y. 668; *Gillet v. Bank of America*, 160 N. Y. 549, 554). But in the real sense of the word, there is here no room for "construction". The intent underlying the instrument of September 26th was, at plaintiffs' insistence, the subject of extended testimony on the trial and the matter of such intent was exhaustively considered. The testimony adduced by defendants was credible and convincing. The findings, based thereon, dispose of any question of agency in this case.

2.

Breach of Agency.

In the prior action of the other stockholders (herein referred to as the Minority Stockholders' Action), in which these plaintiffs appeared as *amici curiae*, the charges of breach of agency, as here, consisted of the claims (1) that prior to the Cooley sale the Bank had received and rejected an offer from General Motors in excess of the option price, and (2) that under its arrangements with Cooley the Bank was the real buyer of the stock and thus acquired an improper interest in the subject matter of the agency.⁶ In that case, as here, plaintiffs relied upon the memorandum of October 11th (P-112), there marked in evidence as Plain-

⁶ A copy of the original complaint in the action of Byron D. Shultz against the Bank (D-33) will be found in the printed copies of the exhibits being submitted by the respondents.

tiffs' Exhibit 44. In that case, as here, they argued that by the provisions of this instrument Cooley had "obligated" himself to transfer a minimum of $\frac{7}{8}$ ths of his purchase to the Bank and had thus yielded "control" of the major part of his purchase to the Bank and its officers.

In that action these claims were fully considered and shown to be without substance. Every charge of misconduct advanced here was decided adversely to the stockholders there.

Mindful of this adverse prior determination, and in an effort to escape the effect thereof, plaintiffs take the self-same charges of agency violation that were tendered in the prior litigation and surround them with accusations of fraud and conspiracy.⁷ Upon the claim that the prior action was merely one to recover "damages for breach of a contract of agency or brokerage" (Pet. p. 27), they would have the Court infer that other and different issues are now involved. But the issues are the same. The instrument

⁷ This atmosphere of fraud is of the general pattern sought to be created throughout this litigation. Prior to the institution of this action plaintiffs instituted a proceeding to remove the Bank as a co-executor of decedent's estate. This was done on the basis of a printed petition which they caused to be circulated among the Bank's Board of Directors, and in which they implied that the Bank had caused decedent to commit suicide. This proceeding was dismissed (254 App. Div. 928). Later they brought another action charging the Bank and two members of the Buffalo Bar with fraud in the administration of decedent's estate. This proceeding was likewise dismissed. In this case, although these transactions had been judicially explored in the prior suits, they took nearly 4000 pages of depositions and so abused the privileges accorded them that the defendants were compelled to move to limit the scope of the depositions and for the appointment of a Referee. This application was granted. The trial of this case lasted nearly two months and consumed some 6500 additional pages of testimony. There were charges of spoliation and suppression of evidence, of forgery in the preparation of records, requests for the impounding of documents to permit of their examination by handwriting experts, and other charges of like character. None of these was sustained in any particular (Finding 236-8; R-244-5). In certain instances these charges proved so palpably false that counsel later withdrew them in open court (R. 1304-6).

that is under attack here is the very same instrument that was under attack there; the charges of misconduct here are the same charges of misconduct that were tried and disposed of there.

The charges of conspiracy in this case need not detain us, for they were not proved and in any event add nothing to the cause of action asserted. While we have heretofore said little concerning the position of Eastman Dillon in this controversy—and for the reason that Eastman Dillon is presenting its own position in a separate brief to be filed on its behalf—its situation in the Houde transaction was simply this: In the early part of 1928, it and Central Trust were called into, and assisted in a proposed financing of the Houde Company. This financing was never consummated. Thereafter, it was asked to consider and sponsor a public offering of the stock for Cooley's account, and refused. In the end, Eastman Dillon *did* introduce Harris Small, to whom ultimately a sale *was* made. For their out-of-pocket expenses in connection with their prior efforts over a period of many months on Houde's behalf, Eastman Dillon and Central Trust were each paid the sum of \$15,000 out of the commission earned by the Bank in connection with the Houde sale,—accompanied by the statement that they were being thus favored “not because we feel obligated to do it”, but simply “in appreciation of the efforts which you made to find a purchaser for this stock” (P-85, P-86).

This was the only connection either of these companies had with the entire Houde transaction. When, subsequently, the sale to Cooley was consummated and a syndicate formed, all of which plaintiffs would have the Court believe were in pursuance of a corrupt agreement to lay hold of the stock and to exploit it for the joint benefit of defendants,

neither Central Trust nor Eastman Dillon were invited to participate either in the sale to Cooley or in the syndicate; nor did they thereafter share in any of the syndicate profits. Similarly, when Eastman Dillon later took part in the underwriting in connection with the purchase of the stock by Harris Small and engaged in a public offering of that stock, neither Cooley nor the Bank nor its officers were invited to participate in such public offering and had no part therein. These various transactions were all separate and distinct, and the Trial Court so found (Finding 173; R. 232).

The claim of Chisholm's position in the alleged conspiracy is hardly more convincing. Plaintiffs realized that they could never go to trial in this case in the face of Chisholm's testimony refuting their claims, and they therefore named him as a defendant. They did this to seal Chisholm's lips as to his conversations with decedent and to provide the illusion of bias where Chisholm was concerned by making it appear that his position in the transaction was somehow akin to that of the other defendants and that it was to his interest to stand with them in this controversy. But this charge is without substance, for Chisholm occupied no different position in the Houde transaction than that of the other stockholders. It was to his interest, as it was to theirs, to secure all he could for his stock. Any "representations" that Chisholm made to decedent could only have had the effect of inducing decedent to sell his stock at exactly the same price and under exactly the same terms as he, Chisholm, was selling his own stock in the very same transaction. In short, to defraud decedent, Chisholm was willing to defraud himself of one dollar for every two dollars of which he allegedly defrauded decedent. This theory is past all ordinary human belief.

While still standing on the various charges of fraud and conspiracy advanced at the trial, the specific theory of recovery here asserted by plaintiffs is a very narrow one: simply stated, it is that the sale to Cooley was a fictitious sale, that the Bank and not Cooley was the real purchaser of the stock, and that the Bank's representations to decedent in the matter were fraudulent. This claim rests upon the memorandum of October 11th, already considered. This memorandum was prepared for the purpose of integrating the substance of the conversations between Cooley and the Bank's officers at the time Cooley agreed to buy the stock and was intended to set forth the undertaking of the parties in the contingencies therein enumerated. This memorandum set forth what the Bank's officers obligated themselves to do in the event of Cooley's death or disability prior to the consummation of the purchase; it dealt, also, with Cooley's intentions regarding the possible formation of a syndicate following the acquisition of the stock. It enumerated the various obligations undertaken by the Bank's officers toward Cooley; it contained no surrender of rights by Cooley to the Bank. Under this instrument Cooley yielded no part of his purchase, nor was it intended that he should. It was recited that the officials of the Bank would assist in the formation of a syndicate; however, the formation of such a syndicate was to be solely at Cooley's election. This is implicit in the instrument; it was so understood by the parties.

Plaintiffs frankly concede (Pet. p. 15) that without the memorandum of October 11th they have no case. It is obvious that even with this memorandum there is no case.

In the last analysis, the claim with respect to the memorandum of October 11th is that it gave the Bank an improper interest in the subject matter of the agency. But

when decedent joined the syndicate—and this was long before he was paid in full for his stock—decedent knew the Bank had acquired an interest in Cooley's purchase. He knew this when he joined the syndicate and became aware of who his co-participants were, even if we assume this was his first intimation of the Bank's participation. With this knowledge what did decedent do? On December 6th, knowing about Cooley's purchase, knowing that the Bank had financed such purchase, knowing about the syndicate's acquisition of the stock from Cooley, knowing the identity of his fellow participants, knowing about the public offering and being that very day in receipt of a letter (D-36) forwarding his new stock which was then selling on the Chicago Stock Exchange at a higher price (R. 1786-7), *he then and there proceeded to accept payment not from Cooley, but from the syndicate managers, both of his share of the syndicate's profits and the unpaid balance due him upon the original sale.* He had, under the original option, parted with a 46% interest in the company on the basis of \$1674.75 per share, had received only part payment, had thereafter through a fresh and independent venture reacquired a 1/17th interest at substantially the same price (\$1745.15 a share) and had then, as a co-member of the syndicate, resold his 1/17th interest at a substantially higher price, to wit, at the rate of \$2640.28 a share. He then simultaneously accepted payment of *all* the sums due him on these successive transactions.

Decedent's conduct, of course, recognized that the syndicate had good title to the stock and was free to make a sale thereof. Upon the assumption that the Bank was his agent decedent knew that it and its officers and directors had become participants in a venture which gave them an interest in the subject matter of the agency. Decedent's con-

duct was not mere silence; it constituted active participation in the very transactions now claimed to have constituted the wrongdoing, conduct which knowingly permitted the syndicate to expend upwards of \$45,000 (P-192, D-41) and resulted in a change of position as to its members who were in the situation of innocent third parties (*Baker v. Cummings*, 169 U. S. 189).

Once we eliminate from this case any question of the nature or *bona fides* of the original sale nothing remains. While a good deal of argument has been predicated upon the declaration of October 13th (P-113), already considered, the claims with respect to this instrument warrant but little further comment. Relied upon by Judge Frank merely as "illuminating" the improper character of the original sale as evidenced by P-112, we have shown that this declaration was executed by Cooley only after he had already flatly committed himself to the purchase. The Bank in turn had committed itself to the Houde stockholders by its letter of acceptance of October 11th (P-101). At this date nothing remained to consummate the purchase except to await the computation of accruals, already referred to the company's own auditors, and to pay the price which computation showed to be due. All the parties to the transaction considered that a sale had been agreed upon and that nothing remained to be done except to make payment. As a practical matter the sale was substantially complete (*Robertson v. Chapman*, 152 U. S. 673, *Hermann v. Hall*, 217 Fed. 947). Under such circumstances it was entirely proper for the new purchaser to encourage the further assistance of the Bank's officers with respect to *his* commitment, and in order to do so to declare his intention with regard to such profits as he might realize on resale. Nothing in the instrument can be regarded as creating any conflict

of interest and duty on the part of the alleged agent to its former principals. As pointed out by Judge Clark, the declaration "had nothing to do with the sale".⁸

Stripped of irrelevancies, the underlying facts in this case can be simply stated. The stockholders, at a time when the Houde Company was undercapitalized and its record of substantial earnings had been short, when most of its business was dependent upon a single contract and when its principal patent had only a short time to run, executed an option which entitled them to be paid \$4,000,000 plus accrued earnings for their stock and they were paid in full. This option was prepared in its final form by decedent's own attorney and was executed in his behalf by his own repre-

⁸We cannot leave this subject without taking note of Judge Frank's criticism of the testimony given by certain of the defendants and counsel for the Bank regarding this declaration and the payments later made thereunder.

In footnote 7 Judge Frank quotes Rea's testimony in the *Goetz* case to the effect that Cooley's payment to him following the resale to Harris Small was merely "a very generous gift". He failed to point out that as this matter was further pursued in the testimony in the same case Rea went on to explain that this payment was based upon a percentage of Cooley's profit "when, as and if any profit resulted", that it was paid in recognition of Rea's services and that Rea would not have received this amount if there had not been a resale (R. 506, 509, 519-20).

Judge Frank also misconceived the import of the statement in the affidavit of General Louis L. Babcock, general counsel for the Bank, to the effect that the evidence was conclusive that there was no agreement in advance that Cooley would pay these sums (*i. e.* to Harriman, Wurst and Rea). This statement was absolutely correct. We have pointed out that not only was there no agreement, but also that the declaration of October 13th was executed by Cooley only after the latter had undertaken to purchase the stock and after his intervening negotiations with General Motors. Although, as we have remarked, the plaintiffs have tried to date this declaration *back* to the original sale they utterly failed in this attempt, the Trial Court finding that the declaration was in fact executed the day it bears date.

Judge Frank's criticism of Harriman's affidavit in the same connection is equally unwarranted. While Harriman mistakenly fixed the date of Cooley's declaration as being after Eastman Dillon had reached its decision not to refinance Cooley's purchase, still the fact that such declaration was not made until after the sale to Cooley was completed was entirely accurate and in accordance with the undisputed testimony in the case.

sentative. Both understood it to be an option. Decedent consummated the sale of his stock on the basis of this instrument, receiving nearly \$2,000,000.00 for his interest in a company in which he had invested but little upon its organization only ten years before. After the execution of the option and prior to the sale to Cooley efforts had been made to sell to numerous concerns. These efforts proved unsuccessful. At the time of Cooley's purchase there was no other purchaser for the stock in sight. As Judge Clark said, "There can be no doubt that the Bank and its associates brought to consummation a disposal of these assets where previous efforts had failed".

The sale to Cooley was *bona fide*, Cooley buying and paying for his purchase with moneys raised upon his *own* credit and with his *own* personal collateral. He was a man of ample responsibility for his undertakings. To make the purchase possible the Bank extended its financial assistance on a perfectly proper basis and against security of unquestioned worth, to a purchaser who could not otherwise have been induced to make the purchase. Because a syndicate subsequently organized and in which decedent participated later sold this stock in the inflationary markets of 1928 at a large profit over what the stockholders had asked and received for their holdings, these many lawsuits have arisen.

Plaintiffs' counsel has, from the inception of this case, sought to twist and torture these facts into a wholly unrecognizable story of fraud and misconduct. But none of these charges has been sustained in any particular. The Trial Court, after hearing defendants and on the basis of a record comprising thousands of pages, held that no fraud was proved and dismissed the complaints. Its action stands approved by the Circuit Court of Appeals. Speaking of the charges of fraudulent conduct advanced by plaintiffs, the majority of that Court have said (R. 2336):

“* * * plaintiffs’ claim of conspiracy depends on a highly involved series of inferences, all against the direct findings of the court. They think that a conspiracy of the bank officials and the investment brokers to get possession of the Houde stock, in order to turn it over for large secret profits, matured as early as July, 1928. Hence with decedent in Europe and with Chisholm a co-conspirator, the opportunity arose. The Bank was an agent and a fiduciary, but nevertheless was the real purchaser of the stock and Cooley was only a front for the Bank. And hence the ‘kickback’ arrangement must actually have been made sometime before the claimed sale of October 11 and as a part of the plan. And this conspiracy was carried out by the other steps leading to the disposal of the stock at an advance and division of the profits. And decedent never knew that the Bank, which was actually his agent, was thus constantly working against his interests. But the evidence does not afford a basis for these deductions, and the district court has found directly to the contrary.”

3.

Statute of Limitations.

In their complaint herein, plaintiffs ask (R. 30):

1. That the Bank pay them \$58,207.89, with interest, being decedent’s share of the commission “fraudulently exacted” by the Bank.
2. That defendants be required to “account” to them for all cash or the value of all property received by defendants by reason of their dealings in the Houde stock, this having reference to the profits on the resale to Harris Small.

3. That defendants be required to pay as "damages" decedent's share (46.1302%) of the difference between \$15,729,000.00 (alleged to be the highest market value of the Houde stock within a reasonable time of its acquisition by the Bank) and \$1,844,091.91 (the price received by decedent). Computation of the damages asserted to have been sustained under this paragraph indicates that recovery of \$6,309,741.40 is sought, which, with interest to the time of suit alone, amounting to about 60%, brings the recovery sought to more than \$10,000,000.00.

The prayer of the complaint is for money only. The action presents no equitable feature, except that plaintiffs seek to give it the appearance of an action in equity by asking for an "accounting" in paragraph "2".

Upon the claim that this action is of purely "equitable cognizance" and could not have been brought at law, plaintiffs argue:

1. That the lower Courts erred in applying the New York statute of limitations. Specifically, it is claimed that federal courts of equity are not bound to follow the local law of limitations when to do so will "conflict" with "equitable principles".

2. That even if the New York law be applicable, the lower Courts erred in failing to apply §53 of the New York Civil Practice Act (the 10 year statute dealing with purely equitable causes) and in holding this case to be governed by the provisions of §48 (6 years).

They further argue:

3. That even if §48 is applicable, the case falls within subdivision 5 of that section, which provides that in an action to procure a judgment on the ground of fraud the action must be brought within six years after discovery of the facts constituting the fraud. It is urged that the lower Courts erred in finding as a fact that decedent had sufficient knowledge to start the statute running.

We address ourselves to each of these contentions:

1. The lower Courts properly applied the New York statute of limitations.

Whether on the basis that they were *bound* by the local statutes (*Erie Railroad Co. v. Tompkins*, 304 U. S. 64, *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202), or that it was *proper* that they should apply these statutes (*Russell v. Todd*, 309 U. S. 280, *Pearsall v. Smith*, 149 U. S. 231, *County v Burlington R. R. Co.*, 139 U. S. 684, *Curtis v. Connly*, 257 U. S. 260), the action of the lower Courts in applying the New York law of limitations was clearly correct. As stated in *Russell v. Todd, supra*, 309 U. S. 280, at p. 293:

“We take it that in the absence of a controlling act of Congress federal courts of equity, in enforcing rights arising under statutes of the United States, will without reference to the Rules of Decision Act, adopt and apply local statutes of limitation which are applied to like causes of action by the state courts.”

The controversy in *Russell v. Todd* arose under a federal statute. The reasons for “adopting and applying local statutes of limitations which are applied to like causes of action by the state courts” are even more compelling in cases where, as here, federal jurisdiction depends on diversity of citizenship alone.

2. The lower courts correctly held that §48, and not §53, of the New York Civil Practice Act, controls this action.

Section 48 of the New York Civil Practice Act (the 6 year statute), in its several subdivisions, and with but the single exception hereinafter noted, applies to causes of action usually denominated as legal; §53 (the 10 year statute) to causes of action exclusively equitable. If, as we contend, the present action is nothing more than one at

law to recover money only, it is clearly governed by the first statute, not the second, and the attitude of federal courts of equity toward local statutes of limitations is not involved. Since the character of the cause of action is controlling, we address ourselves to that question.

The Circuit Court of Appeals, by an unanimous court, has held that the only recovery possibly to be spelled out of plaintiffs' proof was (1) a cause of action for recovery of the Bank's commission, and (2) a cause of action for recovery of the payments by Cooley to the Bank's officers. Our discussion might very appropriately be limited to these two items, items that involved specified, readily ascertainable amounts, that have no equitable features and involved no need whatever for an accounting. It seems hardly necessary to point out, also, that to the extent the complaint seeks recovery of *both* the alleged unlawful "profits" derived from the Harris Small sale (Par. 2 of the prayer) and "damages" for the difference between the value of decedent's stock and what he received for it (Par. 3), there are involved mutually exclusive remedies, any *one* of which may be pursued, but *both* of which may not (Restatement, Agency, §§407, 424, comments (e), (g) and (h); *Taussig v. Hart*, 49 N. Y. 301). We are quite willing, however, to take the complaint as it is, regardless of the deficiencies in plaintiffs' proof and their failure to sustain the allegations thereof. What are the remedies sought thereunder and what cause of action is asserted?

So far as concerns the cause of action for recovery of the Bank's commission (prayer for relief, Par. 1), this clearly involves no equitable features. Recovery of the commission paid to a faithless agent who by his acts has forfeited his rights thereto can be had at law in an action for money had and received, and recourse to equity is not required (*Wechsler v. Bowman*, 285 N. Y. 284, 292).

As concerns the demand for "damages" (prayer for relief, Par. 3), this too is a typically legal cause of action enforced in courts of law, and the jurisdiction of equity is not involved (*Buzard v. Houston*, 119 U. S. 347, *U. S. v. Bitter Root Development Co.*, 200 U. S. 451, *Curriden v. Middleton*, 232 U. S. 633, *Kesner v. Title Guaranty & Trust Co.*, 259 App. Div. 597, aff'd 284 N. Y. 622).

The claim of the inadequacy of the legal remedy therefore rests squarely on the demand for an "accounting" (prayer for relief, Par. 2). It is upon this single paragraph of the prayer that the right of recourse to equity is asserted.

This paragraph deals with the profits derived by the various defendants from their participation in the Cooley syndicate. These profits were *received in money and money alone*. No property was involved. They were derived exclusively from the \$6,000,000 paid to the syndicate managers by Harris Small and distributed through the syndicate managers. The amounts were and are known and definite, being calculated on the same basis as decedent's profits from this same syndicate (R. 238-9). There is here shown no necessity for the impression of a trust or the application of other equitable remedies. (*Schoenthal v. Irving Trust Co.*, 287 U. S. 92, 95; *Gaines v. Miller*, 111 U. S. 395). Indeed, the allegations of the complaint are insufficient to permit the application of any such remedies (*U. S. v. Bitter Root Development Co.*, *supra*, 200 U. S. 451, 475; *Jaffee v. Weld*, 155 App. Div. 110, aff'd 208 N. Y. 593).

The "restitutionary liability" asserted in paragraph 2 of the prayer proceeds upon the theory that the money which defendants received belonged to decedent, and that defendants are under an obligation implied by law to return it. Such a cause of action is quasi-contractual, in the nature of an action for money received, and is en-

forceable in a court of law. The fact that the law may enforce the obligation by the imposition of a trust does not require resort to a court of equity (*Roberts v. Ely*, 113 N. Y. 128; *Mills v. Mills*, 115 N. Y. 80; *Middleton v. Twombly*, 125 N. Y. 520, 524; *Carr v. Thompson*, 87 N. Y. 160; *Keys v. Leopold*, 241 N. Y. 189; *Gervis v. Halsey*, 250 App. Div. 297; *Cwerdinski v. Bent*, 256 App. Div. 612, aff'd 281 N. Y. 782; *Frank v. Carlisle*, 261 App. Div. 13, aff'd 286 N. Y. 586; *Dunlop's Sons, Inc. v. Dunlop*, 259 App. Div. 233, aff'd 285 N. Y. 333; cf. *Banker's Trust Co. v. Hale & Kilburn Corp.*, (C. C. A. 2) 84 Fed. (2d) 401).

In Scott on Trusts, §198.1, it is said:

"Where the trustee is under a duty immediately and unconditionally to pay money to a beneficiary, it is held that the beneficiary can maintain an action of debt or general assumpsit or the modern equivalent of these actions under the codes. * * * In states in which the common law forms of action have been abolished an action at law can be maintained against the trustee where he is under an obligation to pay over money immediately and unconditionally. * * * Where the trustee has wrongfully sold trust property, the beneficiary who is entitled to receive the proceeds can maintain an action at law for money had and received."

Recovery at law in this form of action may be had for the money obtained by agents who profit by concealing from the principal the receipt of a second commission or other inducement from the purchaser (*Wechsler v. Bowman*, *supra*, 285 N. Y. 284; *Graham v. Cummings*, 208 Pa. St. 516); by falsely reporting the price at which they have bought property for their principal (*Sandoval v. Randolph*, 222 U. S. 161; cf. *Byxbie v. Wood*, 24 N. Y. 607); and by wrongfully dealing in the goods of a competitor,

even though no damage to the principal is proved (*Reis & Co. v. Volck*, 151 App. Div. 613).

Where, as here, the cause of action sought to be enforced is essentially one at law based upon an implied obligation to pay over moneys had and received, the six year statute of limitations governs, regardless of whether the action be cast at law or in equity (see cases cited at page 49, *supra*). Its most recent application to actions cast in equity has been to stockholders' derivative actions to recover excessive bonuses from corporate directors (*Cwerdinski v. Bent*, *supra*, 256 App. Div. 612, aff'd 281 N. Y. 782), and to actions to recover profits from the sales to the corporations of property owned by such directors (*Frank v. Carlisle*, *supra*, 261 App. Div. 13, aff'd 286 N. Y. 586; *Dunlop's Sons, Inc. v. Dunlop*, 259 App. Div. 233, aff'd 285 N. Y. 333). In *Frank v. Carlisle*, the Appellate Division said (pp. 15-16):

"However, we go further than Special Term did. We are of the opinion that the 'Oswego' transaction also is barred. In this matter, if we are to cast aside the superfluous allegations which are to be found in the complaint, there is involved simply a sale of stock. *The acts complained of are the acquisitions of properties at a low figure and their resale at a price in excess of that paid by the individual defendants.* Thus plaintiff's cause of action involves a sum of money which can be computed readily. This transaction, according to the complaint, occurred in 1926. Since the complaint was not served until long after the six-year period had expired, this transaction also is barred. (*Potter v. Walker*, 276 N. Y. 15; *Cwerdinski v. Bent*, 256 App. Div. 612, aff'd., 281 N. Y. 782; *Dunlop's Sons, Inc. v. Dunlop*, 259 App. Div. 233.)" (Italics ours.)

The Oswego transaction referred to in the above quotation involved alleged secret profits. The nature of the transaction appears in the opinion in 282 N. Y. 507.

Liability against some of the defendants here is asserted on the basis that they received money with notice, actual or constructive, of a breach of agency. As to them, also, the essential nature of the right asserted is quasi-contractual, in the nature of a cause of action for money had and received. It was enforceable at law and the same statute of limitations applies (*Hart v. Goadby*, 72 Misc. 232; *Banker's Trust Co. v. Hale & Kilburn Corp.*, *supra*, 84 Fed. (2d) 401; *cf. Empire State Surety Co. v. Nelson*, 141 App. Div. 850; *Model Building & Loan Assn. v. Reeves*, 236 N. Y. 331; *Pierson v. McCurdy*, 33 Hun. 520, 529-32, *aff'd* 100 N. Y. 608; *Holt v. Hopkins*, 63 Misc. 537, *aff'd* 136 App. Div. 940; *Price v. Mulford*, 107 N. Y. 303).

In Scott on Trusts, §198.1, it is said:

"Where the trustee has paid trust funds in breach of trust to a third person who has notice of the breach of trust, the third person is liable to the beneficiary in an action at law. So also where the third person has received the money without notice of the breach of trust but has given no value, he is liable in an action at law."

It is evident from the foregoing decisions that the question of the applicable statute of limitations is determined by the essential character of the cause of action sought to be enforced. Where the cause of action is of a *legal* nature ordinarily enforceable at common law, the statute of limitations applicable to such a cause of action will be applied. Resort to equity does not change the character of the cause of action; it is to the cause of action itself that the statute of limitations attaches. This principle was settled at an early date (*Diefenthaler v. Mayor, etc.*, 111

N. Y. 331, 338; *Borst v. Corey*, 15 N. Y. 505; *Butler v. Johnson*, 111 N. Y. 204, 214).

Cases cited by plaintiffs at pages 41-43 of their brief, in which the legal remedy was inadequate, equitable relief was necessary, and the ten year statute of limitations applied, are readily distinguishable. These cases involved the exclusive functions of equity, such as the reformation or cancellation of instruments⁹, the setting aside of conveyances or transactions¹⁰, the appointment of receivers¹⁰, the rescission of contracts¹¹, or the impression of a trust on specific property such as land or securities¹¹. No such relief is sought here. Plaintiffs' objective is money and money only. We have seen no case applying the ten year statute where the cause of action was essentially in quasi-contract for money had and received.

The distinction between the recovery of money and things, as applied to agency cases, is clearly pointed out in Restatement, Agency, §403, comment (f):

"If the agent receives money as a result of breach of loyalty, the principal can maintain an action of quasi contract for the amount. If the agent receives things other than money, the principal can maintain a bill to enforce a constructive trust in the things or, under some conditions, an action for the value of such things."

⁹ *Hanover Fire Ins. Co. v. Morse D. D. & R. Co.*, 270 N. Y. 86. (Reformation of insurance policy.)

¹⁰ *Hearn 45 St. Corp. v. Jano*, 283 N. Y. 139. (Rescission of conveyances in fraud of creditors; impression of a trust, appointment of receiver.)

¹¹ *Falk v. Hoffman*, 233 N. Y. 199 (Rescission of a sale of plaintiff's property and recovery of the proceeds, consisting of cash and securities. The Court held that the purpose of the action was to charge such proceeds with a trust. Plaintiff was entitled to the securities themselves. He could not obtain such relief at law. The statute of limitations was not involved. In the present case, no securities were received by defendants, and plaintiffs have expressly disclaimed that rescission was sought, stating in the Circuit Court of Appeals that "a principal who claims the benefit of secret profits derived from the agency affirms rather than rescinds".)

Brief comment is required by the extravagant claims made for *Potter v. Walker*, 276 N. Y. 15. In that case the ten-year statute was applied to certain directors named as defendants in two causes of action. In one of these the profit derived by defendants was under circumstances involving no correlative loss to the corporation¹²; in the other it consisted almost entirely of securities. In neither instance was the profit received by defendants; it was received by corporations in which they were alleged to have had an interest. Under the circumstances there was no legal right of recovery, and the Court so held. However, the Court was careful to point out that where an action for money had and received would lie, no accounting, and no recourse to equity, was required.

In spite of these facts plaintiffs make the startling claim for *Potter v. Walker* that it "plainly holds that a ten-year statute of limitations is to be applied to any suit for an accounting from a fiduciary who has gained profit from dealing in his fiduciary relation and caused loss to the estate represented by him." (Brief, p. 43).

If the decision stood for any such proposition *Potter v. Walker* would have overruled every case in New York holding that the six, and not the ten-year statute, applies to actions sounding in quasi-contract against agents or fiduciaries. Cases subsequently decided, such as *Frank v. Carlisle* and *Cwerdinski v. Bent*, *supra*, would have gone the other way. That such was not the intention of the

¹² It was alleged that Blair & Co., Inc. had obtained an option to purchase outstanding Pan American stock from E. L. Doheney at \$70 a share. The profit which Blair & Co. Inc. made was derived from the sale of the option to another corporation. The damage to Pan American arose out of a transfer of Pan American assets to Doheney at \$7,802,743.67 less than their value, which the defendant Pan American directors were charged with approving in order to induce Doheney to give the option. The profit involved no loss to Pan American, since nothing more than a sale of an option on outstanding shares of Pan American stock was involved.

Court of Appeals appears from its comment in the *Potter* opinion on the liability of one Stewart, as to which it said:

"The fourth cause of action alleges negligence against the defendant directors for their acts in approving and acquiescing in the payment by Pan-American to defendant Stewart of the sum of \$150,000, which is averred to be a gift. *A remedy at law against Stewart for money had and received would lie and no accounting is necessary.*" (Italics ours.)

That such was not the intention is further evidenced by that Court's comments on the *Potter* case in *Dunlop's Sons, Inc. v. Dunlop, supra*, 285 N. Y. 333, where the Court said:

"*Per Curiam. Potter v. Walker* (276 N. Y. 15) did not decide that the ten-year Statute of Limitations (Civ. Prac. Act, §53) is necessarily applicable to all cases in which corporate directors have profited in any degree through a breach of their fiduciary duties. In such a case an action for an accounting may be brought only for the recovery of gains received by the directors beyond the amount of losses caused to the corporation by their wrong¹³. Where, as in the present case, the gains received by the directors do not exceed the correlated losses suffered by the corporation, no accounting is necessary and the Statute of Limitations which controls the remedy at law is to be applied. (See *Goldstein v. Tri-Continental Corp.*, 282 N. Y. 21.)"

In attacking the adequacy of the legal remedy in the case at bar, plaintiffs do so on the grounds of (1) the as-

¹³ In the case at bar the aggregate of the gains to defendants, which amounted only to what they received from the syndicate managers, not only did not exceed but in fact was but a small fraction of the correlated loss of upwards of \$6,000,000 claimed to have been sustained by decedent. Thus the *Dunlop* decision precluded an accounting here. See also *Corash v. Texas Co.*, 264 App. Div. 292.

serted difficulty as to parties, and (2) the asserted difficulty as to remedies.

As to the asserted difficulty involving the parties, plaintiffs argue that this action could not have been maintained at law because the Bank is an executor of decedent's estate, is a necessary party, and could not have been sued in an action at law by its co-executors, the plaintiffs herein.

This argument disregards the fact that the circumstances neither required a resort to equity nor changed the essential nature of the cause of action. Under the interpretation given to New York Civil Practice Act §194 (*cf.* F. R. C. P. 19), the section dealing with joinder of parties in interest, and such other related sections as New York Civil Practice Act 193, 209, 210, 211, 212 and 213 (*cf.* F. R. C. P. 19, 20), equitable rules as to joinder of parties are made applicable to actions at law (Pomeroy, *Code Remedies*, 5th Ed. §§50, 113, 117, 119, 122). Such sections have been held to permit actions at law where formerly it was necessary to resort to equity because of difficulties as to parties. (*Porter v. Lane Construction Corp.*, 212 App. Div. 528, *aff'd* 244 N. Y. 523; *Schechtman v. Salaway*, 204 App. Div. 549; *Benton v. Deininger*, 21 Fed. (2d) 657; 2 Carmody's New York Practice §503; *cf. Gen. A. F. & L. Assur. Corp. v. Zerbe Const. Co.*, 269 N. Y. 227, 233). Under the liberal modern practice the suit at bar clearly could have been maintained at law.

In support of the contention that difficulties as to parties necessitated a resort to equity, *Rundle v. Allison*, 34 N. Y. 180 is the only decision cited by plaintiffs which involves the statute of limitations. There the court applied the ten-year statute under circumstances which it was careful to point out were "special" and "peculiar."

The case involved the enforcement of a right which from the inception of the contract which created it was

cognizable only in equity. It involved the *internal administration of an express trust*, over which courts of common law have never had jurisdiction. Furthermore, as the court pointed out (p. 183), "no legal contract could exist between herself, on the one side, and herself, with others connected with her, on the other side." A contract of this type of course creates rights cognizable only in equity (1 Williston, Contracts, Sec. 18).

The right sought to be enforced was thus equitable from its inception, and the resort to equity was necessitated by difficulties as to parties *to the contract*, and not merely by difficulties as to parties *to the action*, which is the consideration urged here.

The case at bar was very different. Here decedent's rights, if any, accrued in 1928 and were then enforceable by him in a court of law, by action in quasi-contract, or for damages. Their essential character was not equitable. It is now asserted that because of decedent's death and the appointment of one of the alleged wrongdoers as one of his executors, a resort to equity was necessary, and therefore the character of the right, to which the statute attaches, became equitable, bringing into play an entirely different statute of limitations than that which originally applied. The application of statutory bars is not governed by circumstances so fortuitous. Substance, not form, must be considered. Certainly such events cannot operate to deprive defendants of the benefit of the statute of limitations applicable to legal causes of action.

A conclusive answer to the argument that difficulties as to parties or procedure, necessitating a resort to equity, bring into play the ten-year statute is furnished by *Potter v. Walker, supra*, 276 N. Y. 15. There it was strenuously contended that no matter what the nature of the right sued upon may be, whether legal or equitable, a stock-

holder's derivative action, which under New York law must necessarily be in equity, is always governed by the ten-year statute (p. 17). The contention was forcefully rejected, the Court adopting (p. 27) the following quotation from an opinion by Mr. Justice Lurton:

“ ‘Moreover, the essential character of a cause of action belonging to a corporation remains the same, whether the suit to enforce it be brought by the corporation or by a shareholder. Thus a legal right of action would not be treated as an equitable one, or become governed by the rules applicable to equitable causes of action, *as to limitations, etc.*, because a shareholder has brought suit in equity to enforce it on behalf of the company.’ ”

See also *Russell v. Todd*, *supra*, 309 U. S. 280; *Scott v. Allen*, 264 App. Div. 424, and decisions cited at pages 51-2 of this brief.

Here, the action is representative in that the right sued upon is decedent's right. The essential character of the cause of action remains the same. Neither the form of the action, nor any difficulty as to parties, can change its nature.

Plaintiffs' second contention is that only an accounting would furnish adequate relief. They say that an action at law would not permit them to hold defendants jointly and severally liable, while in equity such liability could be enforced.

This argument is without merit. The nature of the liability depends on the facts and not the forum. There is no fundamental difference in law and equity in this respect. Plaintiffs assert that defendants were liable to make restitution in equity because they were constructive trustees of the money they received through the syndicate. In the case of a constructive trust, as in the case of quasi-contract, the restitutionary obligation is imposed in

order to prevent unjust enrichment. The same basic principles govern both remedies (*Bankers Trust Company v. Hale & Kilburn Corporation*, *supra*, 84 Fed. (2d) 401; *Myers v. Hurley Motor Company*, 273 U. S. 18, 24). Since both remedies rest upon the same fundamental doctrine, the question of joint and several liability is one of substantive law, and the principles upon which this point is determined are the same at law as in equity. Joint liability has been imposed in actions at law for money had and received when the facts warranted it (*Cobb v. Dows*, 10 N. Y. 335, 346; *New York Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503; *Hart v. Goadby*, *supra*, 72 Misc. 232, 239). The contention now advanced by plaintiffs was borrowed from the Special Term decision in *Dunlop's Sons, Inc. v. Dunlop*, 172 Misc. 66, in a case where the two defendants were alleged to have divided the profit, but the Appellate Courts took a contrary view and held that the remedy at law was adequate (259 App. Div. 233, 285 N. Y. 333). Other cases involving numerous defendants in which the legal remedy was held adequate, are: *Frank v. Carlisle*, *supra*, 261 App. Div. 213, *aff'd* 286 N. Y. 586, and *Cwerdinski v. Bent*, *supra*, 256 App. Div. 612, *aff'd* 281 N. Y. 782.

Judge Clark held that "no ground was shown here for purely equitable relief." (R. 2336). In this he was entirely correct. So far as the "restitutionary", (*i. e.*, "accounting") cause of action is concerned, an action at law in quasi-contract was fully as adequate and effective as relief in equity. The defendants received money and money only, through the syndicate managers. If liability existed, it could have been enforced fully at law. There is literally nothing which the arm of equity could have been called upon to perform which the available remedies at law would not have afforded plaintiffs.

3. Section 48 of the New York Civil Practice Act bars this action, whichever of its subdivisions be deemed to control.

It having been demonstrated that the case was not exclusively equitable in character, and that therefore neither the question of the effect of local statutes of limitation in federal equity courts nor the applicability of C. P. A. §53 was involved, it remains only to consider whether the correctness of the decision of the Circuit Court of Appeals, in holding that C. P. A. §48 barred relief, presents a question which this Court will review.

That statute contained the following provisions from 1928 to 1936¹⁴:

"§48. *Actions to be commenced within six years.* The following actions must be commenced within six years after the cause of action has accrued.

1. An action to recover upon a contract obligation or liability express or implied, except a judgment or sealed instrument. * * *

3. An action to recover damages for an injury to property, or a personal injury except in a case where a different period is expressly prescribed in this article. * * *

5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

It is quite immaterial here whether the action be regarded as one, a) for "restitution", or b) to recover "damages", or both. The so-called "restitutionary" cause of action is barred by Subdivision 1, quoted above, which allows six years for "an action upon a contract obligation or liability, express or implied * * *";

¹⁴ Subdivisions 1 and 3 were amended by L. 1941, ch. 329 and L. 1936, Ch. 558, respectively, but their provisions as set forth above apply to this action.

the cause of action for "damages" is barred by subdivision 3, which allows six years "to recover damages for an injury to property * * *" (*Carr v. Thompson*, *supra*, 87 N. Y. 160, *Brick v. Cohn-Hall-Marx Co.*, 276 N. Y. 259, *Adolf Gobel, Inc. v. Hammerslough*, 263 App. Div. 1, *aff'd* 288 N. Y. 177 (mem.)). It is immaterial that fraud, or fraudulent concealment, is alleged and proved (*Wechsler v. Bowman*, *supra*, 285 N. Y. 284, 293); it is equally immaterial whether the cause of action sounds in contract or tort (*Brick v. Cohn-Hall-Marx Co.*, *supra*, 276 N. Y. 259, *Keys v. Leopold*, *supra*, 241 N. Y. 189; *Kesner v. Title Guarantee & Trust Co.*, *supra*, 259 App. Div. 597, *aff'd* 284 N. Y. 622; *Potter v. Walker*, *supra*, 276 N. Y. 15, 26-27). Under both of these subdivisions the statutory period began to run at the time of the transactions alleged to have given rise to the cause of action, and did not depend on the ignorance or knowledge of decedent (*Schmidt v. Merchants Dispatch Transportation Co.*, 270 N. Y. 287, 300, *Carr v. Thompson*, *supra*, 80 N. Y. 160, *Hart v. Goadby*, *supra*, 72 Misc. 232, *Watkins v. Madison County Trust Deposit Co.*, 24 Fed. (2d) 370 (C. C. A. 2), *Miller v. United States Gypsum Co.*, 96 Fed. (2d) 69 (C. C. A. 2).

Judge Frank thought that plaintiffs had two causes of action, one to recover decedent's share of the money paid by Cooley to the Bank's officers, and the second to recover decedent's share of the Bank's commission. He had no doubt that the cases, including *Wechsler v. Bowman*, *supra*, 285 N. Y. 284,¹⁵ barred recovery of the Cooley payments

¹⁵ The intimation that the *Wechsler* case has been overruled by the decision in *Nasaba Corp. v. Harfred Realty Corp.* 287 N. Y. 290, decided less than a year later, and containing no reference whatsoever to the *Wechsler* decision is without foundation. The *Nasaba* case was an action for damages only and involved no question of agency. The case arose before answer on a motion addressed to the complaint. On the allegations of the complaint the Court held that a cause of action for *fraud* was alleged, which brought the action under §48(5) of the New York Civil Practice Act making the time of the discovery of the fraud the essential, controlling factor. The nature of the restitutionary liability of defaulting fiduciaries was not considered.

(R. 2346). He did doubt that it barred recovery of the commission, but this doubt was not well-founded. It seems clear that had the agent in the *Wechsler* case "retained" the commission paid by the principal instead of receiving it under an arrangement which constituted him a mere "conduit" for its passage to the guilty executor, there would have been created an implied promise to repay, upon which recovery could have been based. In that event the cause of action for recovery of the payment by the principal would have been barred under §48(1) just as was the cause of action for recovery of the payment by the purchaser which was retained by the agent. This conclusion is not occasioned by any dictum, as Judge Frank says; it is predicated upon reasoning essential to the result in the *Wechsler* case.

This leaves only the question of the applicability of §48 (5) which deals with actions "to procure a judgment on the ground of fraud". Unless allegations and proof of actual fraud were essential to the recovery sought, actual fraud being the gravamen of the cause of action, §48(1) and (3) are the controlling limitations, and §48(5) is inapplicable. (*Wechsler v. Bowman, supra*, 285 N. Y. 284, 293; *Brick v. Cohn-Hall-Marx Co., supra*, 276 N. Y. 259; *Adolph Gobel, Inc. v. Hammerslough, supra*, 263 App. Div. 1, aff'd. 288 N. Y. 177 (mem.); *Carr v. Thompson, supra*, 87 N. Y. 160; cf. plaintiff's brief, pp. 34-35). In the lower courts the plaintiffs, realizing that they had failed utterly to establish fraud, urged that they were entitled to recover *without* proof of fraud. Liability, they said in their brief in the District Court, existed even though the intentions of the defendants were "pure as the driven snow" and though the Houde stock was not worth "a thin dime" (Page 118). Both the Trial Court and Judge Clark took cognizance of this contention (R. 198, 2333).

In their present application they return to the fraud thesis in order to escape the clear bar of §48(1) and (3). But here again their contention is wholly without merit and the courts below so found. In considering §48(5) the following legal principles must be borne in mind.

No problem as to the essential character of the action, whether legal or equitable, is presented under this section, which applies whether the action is cast at law or in equity (*Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213, 214-15). The statute is thus applicable in the federal courts, whether the suit be at law or in equity. (*Russell v. Todd*, *supra*, 309 U. S. 280; *Ball v. Gibbs*, 118 Fed. (2d) 958).

While under this statute the cause of action is not "deemed to have accrued until the discovery" of the fraud, the cases clearly hold that when there is knowledge of sufficient facts to suggest the need of inquiry the statute begins to operate; knowledge of the details is unnecessary (*Higgins v. Crouse*, 147 N. Y. 411; *Sielcken-Schwarz v. American Factors, Ltd.*, 265 N. Y. 239; *Klotz v. Angle*, 220 N. Y. 347; *Coffin v. Barber*, 115 App. Div. 713; *Ectore Realty Co. v. Manufacturers Trust Co.*, 250 App. Div. 314; *Kellogg v. Kellogg*, 169 App. Div. 395, *aff'd.* 224 N. Y. 597).

This rule is uniformly recognized and applied in the Federal Courts (*Talmadge v. U. S. Shipping Board*, 54 Fed. (2d) 240; see also *Wood v. Carpenter*, 101 U. S. 135; *Foster v. Mansfield, etc., R. Co.*, 146 U. S. 88, *Dugan v. O'Donnell*, 68 Fed. 983, 992-3; *Prentiss v. McWhirter*, 63 Fed. (2d) 712; *United States v. Christopher*, 71 Fed. (2d) 764; *Cooper v. Ohio Oil Co.*, 25 Fed. Supp. 304, 311, *aff'd.* 108 Fed. (2d) 535; *Baker v. Cummings*, 169 U. S. 189).

The burden of proving that the cause of action herein accrued less than six years prior to the commencement of this action was on the plaintiffs (*Mason v. Henry*, 152 N. Y. 529; *Jelliffe v. Thaw*, 67 Fed. (2d) 880). This burden they undertook, but failed to discharge. Although plaintiffs in-

sisted upon a strict compliance with §347 of the New York Civil Practice Act, defendants proved affirmatively that decedent was intimately connected with all the Houde transactions and, as the Trial Court found, had actual knowledge of the "basic and material facts" (Finding 239; R. 245). This was sufficient to start the statute running.

The findings cover in detail the knowledge indisputably possessed by decedent and his participation in the transactions¹⁶. To summarize briefly:

Upon plaintiffs' theory decedent entered into an agency relationship with the Bank, and the Bank and its officers thereafter improperly acquired an interest in the subject matter of the agency. Upon this theory of the case, Shultz knew that the Bank was his agent. He knew that Cooley was purporting to buy the stock. He knew that Cooley was a director of the Bank¹⁷. He knew that the Bank was advancing the money to finance Cooley's purchase. He knew that the Bank had undertaken to see that Cooley made payment of the deferred balance of the purchase price of his stock. He knew that about a week after he had delivered his stock for Cooley's purchase, *and before he received full payment for it*, Cooley was organizing a syndicate to acquire the stock at the same price he had paid for it, and that the Bank, its investment affiliate, and many of its of-

¹⁶ See, particularly, Findings 12, 13, 17, 18, 19, 23, 36, 48, 49, 50, 51, 53, 67, 68, 70, 71, 73, 94, 95, 99, 102, 103, 105, 106, 107, 110, 111, 112, 114, 115, 116, 130, 131, 132, 139, 162, 163, 164, 165, 166, 167, 168, 174, 176, 193, 197, 199, 200, 203, 204, 205, 206, 213, 214, 215, 216, 217, 218, 219, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 239 (R. 205-45).

¹⁷ This fact alone was sufficient to start the statute running. If there was agency, Cooley, as a director of the Bank, was under a disability to purchase (*Scott on Trusts*, §170.11; *Chicago, etc. Ry. v. Des Moines, etc. Ry.*, 254 U. S. 196, 212). Knowledge of any invalid feature in the transaction was sufficient to constitute accrual of the cause of action. (*Baker v. Cummings*, *supra*, 169 U. S. 189, 197-98; cf. *Talmadge v. U. S. Shipping Board*, *supra*, 54 Fed. (2d) 240, 243). Judge Frank's remarks on this subject at R. 2341 were addressed to the question of ratification or acquiescence. The degree of knowledge required to bring into play the statute of limitations is substantially less.

ficers and directors were participating in the syndicate. He knew that certain officers and directors of the Bank had been elected officers and directors of Houde. He knew that the syndicate agreement reserved 25% of any profit to Cooley and that this 25% was payable to Cooley or his "assigns". He knew of the sale by the syndicate to Harris Small, and was advised to the penny of the amount received by Cooley and the basis of the calculation of the profits of the other subscribers. He received and retained his syndicate profit of \$76,942.39. He participated to his profit in the subsequent public sale of stock of the newly organized company. *He was the only one who participated in all the Houde transactions.* He continued his connection with Houde as president after the old officers had resigned and became an officer and director of the newly-formed Michigan corporation.

The courts below quite properly, and in accordance with the well recognized rule in New York, held that this knowledge possessed by decedent was sufficient to start the statute running. As stated in *Higgins v. Crouse, supra*, 147 N. Y. 411, 415-6:

"Fraud lies in the intent to deceive, but the mental emotion is inferred from the facts which indicate it, and it is with those facts and the inferences to which they lead that the law necessarily deals. When, therefore, facts are known from which the inference of fraud follows, there is a discovery of the facts constituting the fraud and within the precise terms of the statute. That the defrauded party did not actually draw the inference, but shut his eyes to it, does not stop the running of the statute. He ought to have known, and so is presumed to have known, the fraud perpetrated. * * * Let us suppose that the injured party does not know all the facts, is not aware of enough of them to justify a decided inference of fraud, but does know

sufficient to fairly arouse suspicion, to create a probability, to suggest the need of an inquiry. Can a party so situated omit all investigation, remain purposely blind, neglect the duty of inquiry, when reasonable and natural action would reveal the truth and disclose the fraud? I think not. In such a case it seems to me that we are bound to impute to the party the knowledge which he ought to have had and would have had if he had done his duty, and say for the purpose of the Statute of Limitations that there was in law a discovery of the facts which constitute the fraud. Certainly there was a discovery of some of them, and the party should be charged with a knowledge of the rest when he might and should have known them."

In Conclusion.

The application for certiorari should be denied.

Respectfully submitted,

HAROLD R. MEDINA,
LOUIS L. BABCOCK,
NOEL S. SYMONS,
MASON O. DAMON,
WILLIAM GILBERT,
Respondents' Counsel.



OCT 3 1942

CHARLES C. CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as
Co-Executors under the Last Will of Albert B.
Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY,
Individually and as Co-Executor under the Last Will
of Albert B. Shultz, Deceased, *et al.*,

Respondents.

ADDITIONAL EXHIBITS REFERRED TO IN BRIEFS
OF RESPONDENTS SUBMITTED IN OPPOSITION
TO APPLICATION FOR CERTIORARI.

HAROLD R. MEDINA,
LOUIS L. BABCOCK,
NOEL S. SYMONS,
MASON O. DAMON,
WILLIAM GILBERT,

Respondents' Counsel.

Table of Contents

This pamphlet contains copies printed for the court's convenience of those additional exhibits (the originals of which were duly filed with the clerk of this court pursuant to order of Hon. Harold P. Burke, D. J.) deemed by respondents essential to passing on this petition. These exhibits are submitted in chronological order. A numerical index follows:

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[Defendants'] Exhibit P-29.*

(Received in evidence 11/15/40, R. 954)

Letterhead of
CENTRAL TRUST COMPANY OF ILLINOIS
Chicago, Illinois

Chicago, June 6, 1927

Mr. George P. Rea, Vice President
Manufacturers & Traders-Peoples Trust Company
Buffalo, N. Y.

Dear George:

I had a chance to talk to our people here today about the Houde Engineering Co., and I am afraid that on the basis of any showing they have made so far their price is clear out of line. I understood from you over the telephone that they were prepared to demonstrate they had made \$400,000 last year but I did not see a fair demonstration of that in any of the additional data you sent. What is your opinion on this? Do you think they made any such amount? I would have to be pretty thoroughly sold on the matter to be interested on the basis of over \$2,000,000.

It seems to me, therefore, it might be better to let the matter ride until my next visit to Buffalo, which might be in the near future. At that time you could probably put me in touch with the principals and we could have a talk with them together.

Yours very truly,

JAMES G. ALEXANDER

Executive Vice President.

JGA-ALM

*Identified as Ex. P-29 on depositions herein.

[Defendants'] Exhibit P-30.*

(Received in evidence 11/15/40, R. 954)

June
7th,
1927.

Mr. James C. Alexander,
Central Trust Company of Illinois,
Chicago, Illinois.

Dear Jim:

I have your letter this morning in regard to the Houde Engineering Company. They actually showed last year \$180,000.00, after charging off everything possible; and after such items as \$125,000 in advertising; \$75,000. in engineering and some items which they claimed are not going to be spent in the future.

The picture is one of those things that I think you must know intimately as to the current conditions, rather than to judge it solely on the actual figures of past performance.

Their asked price of \$2,400,000., as I said to you, seems awfully high, and yet they have got a good deal to talk about in discussing their company.

I think you would be very much interested, if you are interested at all, in spending the necessary time to talk with the principals, and I would suggest that if you have any choice as to a trip to Buffalo that you make it sooner rather than later, as various people have been, and are, flirting with the company with ideas similar to yours.

Let me have some warning as to when you might come, if possible, so that I can arrange to have the right people here.

Yours very truly,

GPR:GW

* Identified as Ex. P-30 on depositions herein.

[Defendants'] Exhibit P-31.*

(Received in evidence 11/15/40, R. 954)

Letterhead of
CENTRAL TRUST COMPANY OF ILLINOIS
Chicago, Illinois

June 17, 1927.

Mr. George P. Rea, Vice President
Manufacturers & Traders Trust Company
Buffalo, N. Y.

Dear George:

After returning from the east I had an opportunity to talk with Cortelyou relative to the Houde business and have come to the conclusion that their price is quite out of line. I do not mean by that they are not justified in keeping the business, unless they can get this price, but it is capitalizing the future to too great an extent for new people to come in.

Let us keep in touch with the matter, and possibly conditions may change a little bit so that we may work something out. I will discuss it further with you the next time I am in Buffalo, and in the meantime I think you had better advise the principals that we are not interested at the figures suggested.

Yours very truly,

JAMES G. ALEXANDER
Executive Vice President.

JGA-ALM

* Identified as Ex. P-31 on depositions herein.

[Defendants'] Exhibits P-24a/b.*

(Received in evidence 11/26/40, R. 1088)

(Copy)

FORD MOTOR COMPANY
Detroit, U. S. A.

January 20, 1928
Attention Mr. A. B. Shultz
President

Houde Engineering Corp.,
Buffalo, New York.

in replying refer to P-

Gentlemen:

Referring to shop right dated January 20th, 1928, which grants us, for a consideration, the right to manufacture and have manufactured, shock absorbers, under patents owned or controlled by Houde Engineering Corporation, we agree to incorporate in our orders and specifications to such companies or outside organizations making such shock absorbers a statement as follows:

“The Second Party, in the acceptance of this purchase order agrees not to engage in the manufacture or sale of Houdaille shock absorbers for use or sale to any person or persons other than the First Party, during the execution of this order, or for a period of two years after the completion of this order.”

FORD MOTOR COMPANY
A. M. WIBEL (Signed)
Purchasing Agent

* This is the same as the exhibit annexed to Defendants' Exhibit P-63. These exhibits were identified as P-24 a & b on depositions herein.

(Copy)

Detroit, Michigan
January 20, 1928

Ford Motor Company
Highland Park, Michigan.

Gentlemen:

In consideration of your purchase orders Nos. H-20315 and H-20314, dated January 20th, 1928, for Fifty Thousand (50,000) clockwise, and Fifty Thousand (50,000) anti-clockwise Houdaille shock absorbers respectively, less lever, drag link, or fittings, as specified in said purchase orders, at a cost to you of \$2.37 each, F. O. B., Buffalo, the said shock absorbers being more particularly identified by your blue print No. A-18015-B, our No. 1-461, clockwise, and your No. A-18016-B, our No. 1-462, anti-clockwise, we hereby grant to the Ford Motor Company, its subsidiaries and associated companies, an irrevocable temporary license for a period of two years from the date hereof, to make, or have made, use, and sell shock absorbers embodying the invention or inventions disclosed in any and all patents or patent applications, both in the United States and foreign countries, which are now owned and/or controlled by us or which may hereafter be acquired by us during the life of this agreement which relate to Hydraulic shock absorbers or their parts.

It is understood, however, that the temporary license hereinabove granted shall become permanent and irrevocable when you shall have purchased from us an aggregate number of One Million, Eight Hundred Forty Thousand (1,840,000) shock absorbers of substantially the type above mentioned. Said temporary license shall commence immediately and shall run until the completion of the purchase of said One Million, Eight Hundred Forty Thousand, (1,840,000) shock absorbers, at which time the temporary

license shall automatically become permanent without any additional writing.

It is further understood that the additional number of shock absorbers, above the initial number of One Hundred Thousand (100,000), appearing on purchase orders Nos. H-20313 and H-20314, hereinbefore mentioned, will be furnished you at a price to be mutually agreed upon between the parties hereto, but not to exceed \$2.37 each.

It is further understood and agreed that we are at no time during the life of this agreement to be compelled to manufacture and furnish you with more than 4,000 Houdaille shock absorbers on any working day of 24 hours unless otherwise agreed upon between us, deliveries to be governed by shipping specifications on your purchase orders and release authorizations.

It is further understood that the undersigned are the owners of or control the following enumerated patents or patent applications:

Feb. 10, 1914	1,087,017
May 17, 1927	1,628,811
May 10, 1927	1,627,810
Aug. 15, 1922	1,426,115
Aug. 17, 1923	1,451,964
June 1, 1915	1,141,246
Jan. 3, 1922	1,402,610
July 1, 1924	1,499,660

Applications

Mr. Shultz—Serial No. 170628

Mr. Shultz—Serial No. 85677

It is further understood that this license shall extend only to shock absorbers and parts for shock absorbers for use in connection with products manufactured by the Ford Motor Company, its subsidiaries and its associated companies.

It is further mutually understood and agreed that each of the parties shall have the right to use any of the methods or improvements that may be developed by either party hereto during the life of this agreement, in the manufacture by it of the Houdaille Shock absorber hereinbefore identified by said blue prints, your No. A-18015-B, our No. I-461, clockwise, your No. A-18016-B, our No. I-462, anticlockwise.

We hereby covenant that we own or control the rights purported to be given hereby and further agree to take any additional step or steps or sign any additional papers which may be necessary to lodge said rights in said licensees and to enable the licensees named herein to sell hydraulic shock absorbers of the type specified in countries foreign to the United States as standard equipment on motor vehicle products manufactured by said licensees.

It is further understood that the Ford Motor Company does not expressly or impliedly admit the validity or infringement of any patents under which it is herein licensed.

HOUDE ENGINEERING CORPORATION
By A. B. Shultz
President

[Plaintiffs'] Exhibit P-282.*

(Received in evidence 12/2/40, R. 1372)

50,000 Class A Shares, bearing \$2.00 per annum cumulative dividend—preferred as to assets—callable at 40—to be bought at 20—A Stock to be participating to \$4 per share and convertible share for share.

100,000 Class B Shares to present stockholders—50,000 additional shares held in reserve for conversion.

After \$100,000 or \$2 per share dividend on A Stock, then \$100,000 or \$1 per share can be paid on B stock—of any additional amount set outside for dividends, one third be paid on A stock, $\frac{2}{3}$ on B or in other words, the same dividend per share, until A has received \$4, then participating feature on A ceases.

Option on 30,000 shares of the issued B stock, an amount necessary for listing—length of option suggested is two years—price to of option to be agreed upon—Recommend \$10 per share if earlier listing is desired as compared to what could probably be done at some higher option price.

* This exhibit is in the handwriting of A. B. Shultz (see stipulation at transcript of record, page 437). It was marked Ex. P-282 on depositions herein.

[Plaintiffs'] Exhibit P-389.*

(Received in evidence 11/18/40, R. 967)

CHICAGO

EASTMAN, DILLON & Co.

To Buffalo Office

9/24/28

Please say to George Rea, Manufacturers & Traders Bank:

Have appointment arranged with people here for tomorrow morning. Therefore suggest postponing trip to Buffalo until later in week. Strongly urge that you secure option today. Seeing Glover's lawyers this afternoon. If there are other questions will telephone.

G. N. BUFFINGTON

* Identified as Ex. P-389 on depositions herein.

[Plaintiffs'] Exhibit P-391.*

(Received in evidence 11/18/40, R. 967)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

9/25/28

Please say to George Rea, M. & T. Bank, Buffalo:

Cannot proceed further with people here until I can disclose contract and recent balance sheet. Will be here tonight until 5:30 our time.

G. N. BUFFINGTON

* Identified as Ex. P-391 on depositions herein.

[Plaintiffs'] Exhibit P-392.*

(Received in evidence 11/18/40, R. 968)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

9/25/28

Please say to George Rea, M & T Bank, Buffalo:

Have had talk with Bendix personally and find him very much interested. Leaving for New York tomorrow. Wants figures quickly as possible. Can have meeting later in week. Interesting to know that he knows good deal about situation. Advise me soon as possible your position.

G. N. BUFFINGTON.

* Identified as Ex. P-392 on depositions herein.

[Defendants'] Exhibit P-494b.*

(Received in evidence 12/3/40, R. 1521)

OFFICE MEMORANDUM*Name**Houde Engineering*

1928

- Sep 24 to conf with Jellinek—sale of city
 25 to conf with Mr. Shultz & Mr. Chisholm this evening and revision of option
 Oct 9 to conf with Swart & letter to you—Hiram Huert proceeding
 16 to conf at M & T with Wurst Sawyer & later with Dave Shultz, & later with Sawyer—stock records.

* Office memorandum in handwriting of Irving L. Fisk. Identified as Ex. P-494b on depositions herein.

[Plaintiffs'] Exhibit P-393.*

(Received in evidence 11/18/40, R. 968)

CHICAGO

To New York Operator EASTMAN, DILLON & Co.

9/26/28

Please leave the following message at the Ambassador Hotel for Mr. George Rea:

“On Monday Bendix requested that I furnish him with full details regarding our situation so that he might consider matter with associates on the way to New York. I refrained from disclosing facts in detail until we had option. Find this morning that he will be in New York at Biltmore Hotel tomorrow sailing for Europe Friday. I am afraid this will delay definite action although his Treasurer Bittner feels this does not make deal impossible. Could leave for New York today on Century if option is in such shape we could talk with Bendix tomorrow.”

G. N. BUFFINGTON

* Identified as Ex. P-393 on depositions herein.

[Defendants'] Exhibit P-395.*

(Received in evidence 11/19/40, R. 985.)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

9/27/28

Please say to Mr. George Rea M & T Bank, Buffalo:

"Can you tell me this morning what portion of company's output has gone to Ford? Borg is interested in knowing what portion of earnings have been derived from this source. Will try to contact Bendix this morning. Would also appreciate receiving recent balance sheet and copy of option. Will wire you later today."

G. N. BUFFINGTON

* Identified as Ex. P-395 on depositions herein.

[Plaintiffs'] Exhibit P-397.*

(Received in evidence 11/18/40, R. 968)

CHICAGO
EASTMAN, DILLON & Co.

To Buffalo office

10/1/28

Please Ask George Rea, Manufacturers & Traders Bank:

"Who is Krauss & Company? Have the holders of 265 shares in any way indicated their willingness to sell at stated price?"

BUFFINGTON

* Identified as Ex. P-397 on depositions herein.

[Defendants'] Exhibit P-109 (first two pages).*
(Received in evidence 11/26/40, R. 1101)

October 2, 1928.

Mr. J. R. Oishei
Trico Products Corporation
624 Ellicott Street
Buffalo, New York

Dear Mr. Oishei:

ADDENDUM AND SUMMARY TO THE
HOUDAILLE REPORT HEREWITH

As a further thought and summary of the attached report and the Houdaille patent, my opinion may be expressed as follows:

The Houdaille patent showing the basic features of the combination used in the present day construction of the Houdaille shock absorber expires in February, 1931, a little over two years from the present date. The most important of the subsequent patents is the Schultz patent No. 1,426,115, covering the wing construction of the piston or vane and also the improved form of air leakage valve. This wing or enlarged piston construction is very common in hydraulic or fluid motors, a number of examples of which we have in our files here. The purpose of the wing construction in the hydraulic motor is the same purpose for such construction in the Houdaille device—it is to obtain a more intimate seal between the piston or vane and the casing, and also to add strength to the piston or vane. I think the Schultz patent may be open to serious attack as not embodying invention in this feature but merely the ap-

* Bears exhibit mark in previous litigation, and identified as Ex. P-109 on depositions herein.

plication of mechanical skill and the bringing over of the well-known pistons of this type from the general line of hydraulic devices. The air leakage valve will probably be found in some of the art but I do not believe the analogy between such art and the shock absorber art will be quite so striking as in the case of the piston or vane.

On the whole record, I would say that two years from next February it should be possible to design a satisfactory hydraulic shock absorber using the principles shown in the old Houdaille patent which would satisfactorily perform its job. I think, without question, that at that time considerable competition in this item may be looked for.

Yours very truly,

BAB:AMB

[Defendants'] Exhibit P-403.*

(Received in evidence 11/19/40, R. 985)

CHICAGO

EASTMAN, DILLON & Co.

To Buffalo office

10/3/28

Please tell Mr. George Rea, M. & T. Bank, Buffalo:

"My people here have definitely declined business and I must agree their reasoning is logical. They do large volume with General Motors. As you know practically every independent is using Lovejoy instruments. Should Borg attempt to build up business by taking this volume away from General Motors it would hurt their present relations. Please advise your position so that I may know how to proceed."

G. N. BUFFINGTON

* Identified as Ex. P-403 on depositions herein.

[Defendants'] Exhibit D-49.

(Received in evidence 12/5/40, R. 1683)

THE BUFFALO CLUB
VISITOR'S REGISTER

Date 1928	Name of Visitor	Residence	By Whom Introduced
Oct. 12	R. J. Emmert	Dayton, Ohio)	
" "	E. F. Rossman	Anderson, Ind.)	John R. Oishei
" "	C. E. Wilson	" "	"
" "	A. L. Templin	Pittsburgh	S. K. Colby
" "	Lucien Lacombe	Paris, France	Dean R. Nott
" "	T. P. Schnvily	Trenton, N. J.	Barr
" "	J. E. McCallum	"	"
" "	Capt. R. H. Ranger	Newark, N. Y.	F. A. Ridbury
" 13	R. O. Eastman	Cleveland	O. D. Light
" "	L. D. Bell	"	S. K. Colby
" "	Chas. W. Hall	Buffalo	"
" "	L. D. Blumenstein	"	J. F. VanDeventer
" "	F. R. Huston	N. Y. City	"
" "	C. F. Adams		S. Wallace Dempsey
" 15	C. R. Hayne	N. Y.	A. B. Henin
" "	J. J. Connelly	N. Y.	O. H. Williamson
" 16	John W. Dougherty, Jr.	N. Y. C.	Regis O'Brien
" 17	Paul H. Helms	Beverly Hills, Calif.	Horace Mann
" "	Ralph Riddleberger	New York	Frank C. Trubee, Jr.
" "	Mr. Davis	" "	"
" "	Mr. Wallace		"
" "	Mr. Truber		"
" "	B. S. Stephenson	N. Y. City	Justus Egbert
" "	F. G. Hitchcock	Detroit	A. H. Sharpe
" "	Grant Pierce	New York	R. B. Flershem
" "	W. W. Wetmore		
" "	E. C. Brockett	Buffalo	H. A. Vidal
" "	A. P. Skaer	Buffalo	H. A. Vidal
" "	Harvey Hanks	"	"
" "	E. H. Laphart	"	"
" "	Joseph J. Feist		"

[Defendants'] Exhibit 494c.*

(Received in evidence 12/4/40, R. 1538)

Office Memorandum

Name Houde Engineering
1928

- Oct 17 to conf with Sawyer—minutes & claims of Scully Bros.
26 to services at M & T on transfer of all stock certs to Fred B. Cooley

* Office memorandum in handwriting of Irving L. Fisk. Identified as Ex. P-494c on depositions herein.

[Defendants'] Exhibit 494a.*

(Received in evidence 11/4/40, R. 1538)

Office Memorandum

Name A. B. Shultz
1928

- Oct 19 to conf with you and later at M & T with Wurst & Sawyer
22 to all day on details of sale, all morning at M & T with Falk & Wurst, and confs in PM with you, Harmon & Holliday
23 to confs. with you, Harmon, Wurst and Stanley Falk
24 to most of day at M & T checking figures in AM & with you here & there in PM

* Office memorandum in handwriting of Irving L. Fisk. Identified as Ex. P-494a on depositions.

[Defendants'] Exhibit P-120.*

(Received in evidence 11/27/40, R. 1125)

AGREEMENT, made this 22nd day of October, 1928, between FRED B. COOLEY, representing the New York Car Wheel Company, purchaser under the terms of an option dated September 26th, 1928, of the capital stock of Houde Engineering Corporation, party of the first part, and FRANK P. SCULLY and JAMES N. SCULLY, stockholders of said Houde Engineering Corporation, parties of the second part.

In consideration of the sum of One Dollar (\$1.00) by each party to the other in hand paid, the receipt whereof is hereby acknowledged, and for other good and sufficient considerations, the party of the first part, in addition to the sums agreed to be paid to the stockholders to Houde Engineering Corporation for their stock holdings in the option referred to, will pay the sum of Fifty Thousand Dollars (\$50,000.00) to the parties of the second part on receipt and delivery of the certificates in transferable form representing all the stock holdings of the parties of the second part in said Houde Engineering Corporation, and upon receipt further of a general release executed by each of the parties of the second part to the Houde Engineering Corporation, and all of its stockholders, directors and officers, and such other or further assurances of title and interest covering any claim whatsoever of the parties of the second part against the Houde Engineering Company, its stockholders, officers and directors. De-

* This exhibit is the same as Defendants' Exhibit P-121 except that the latter is signed by F. B. Cooley, Frank P. Scully and James N. Scully and does not contain the legend in the lower left corner signed by A. B. Shultz and reading "I hereby agree to furnish \$50,000 to Mr. Cooley to carry out above contract if entered into by him." Defendants' Exhibit P-120 bears exhibit mark in previous litigation and was identified as Ex. P-120 on depositions herein.

livery of the foregoing certificates and documents to be made not later than Three o'clock P. M., of Tuesday, October 23rd, 1928. James N. Scully, one of the parties of the second part, also agrees immediately to deposit his stock with the Manufacturers & Traders-Peoples Trust Company in transferrable form against their receipt, and immediately to deliver his resignation as an officer and director of the company so that his vacancy may be filled at a meeting to be held on October 22nd, 1928, and said parties of the second part hereby agree to make the delivery and transfer of the documents hereinbefore referred to at the time and in the manner herein provided.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

F. B. COOLEY (SEAL)

I hereby agree to furnish \$50,000. to Mr. Cooley to carry out above contract if entered into by him

A. B. SHULTZ

[Defendants'] Exhibit P-123.*

(Received in evidence 10/30/40, R. 343)

FOR AND IN CONSIDERATION of the payment to the undersigned, FRANK P. SCULLY, of the sums of money described in an option dated the 26th day of September 1928, to Krauss & Company, which option has been assigned to New York Car Wheel Company, which is now the owner and holder of said option, the undersigned does hereby sell, as-

* Identified as Ex. P-123 on depositions herein.

sign, transfer and deliver to New York Car Wheel Company all of his right, title and interest in and to one hundred thirty-one and one-quarter (131¼) shares of the Houde Engineering Corporation, being certificates No. 16 for 50 shares; No. 17 for 50 shares; No. 18 for 31¼ shares. The undersigned hereby authorizes the transfer of said shares on the books of the corporation.

The delivery of these shares is likewise conditional upon the performance by the New York Car Wheel Company of the terms and conditions of an agreement entered into the 22nd day of October, 1928, between Fred B. Cooley, representing New York Car Wheel Company, and Frank P. Scully and James N. Scully, which is made a part hereof.

FRANK P. SCULLY

WITNESS:

JAMES N. SCULLY

[Defendants'] Exhibit P-139.*

(Received in evidence 12/4/40, R. 1546)

October 24th, 1928.

RECEIVED of New York Car Wheel Company, by Fred B. Cooley, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00), part payment on a total of One Million Eight

* Bears exhibit marks in previous litigation, and identified as Ex. P-139 on depositions herein. This exhibit is the same as Plaintiffs' Exhibit P-542 except that on the latter the notation "O K I. L. Fisk" is omitted and under the signature of Albert B. Shultz appears the following addendum:

"We undertake to see that payments are made to A. B. Shultz, in accordance with the terms of the above receipt, on demand.

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY

By PERRY E. WURST,

Executive Vice President."

Hundred Eighty-Four Thousand Ninety-One and 91/100 Dollars, (\$1,884,091.91), which is the full amount due me for One Thousand One Hundred Twenty-Five (1,125) shares of the Capital Stock of Houde Engineering Corporation, sold and delivered under the terms of an option dated September 26th, 1928, given to Krauss & Co., the three percent (3%) commission allotted to the latter having been deducted from the sale price. The balance is to be paid to me on demand, except that I may be permitted to take stock of a new corporation in part payment of the balance.

It is understood that I am repaying to Fred B. Cooley the sum of Fifty Thousand Dollars (\$50,000.00), being the amount paid by him to settle the claim of Francis P. Scully and James N. Scully against me.

ALBERT B. SHULTZ

O K

I. L. FISK

[Plaintiffs'] Exhibit P-74.*

(Received in evidence 11/15/40, R. 950)

Letterhead of
EASTMAN, DILLON & Co.
Chicago, Illinois

October 31, 1928.

Mr. George Rea,
Manufacturers & Traders Peoples Trust Co.,
Buffalo, New York

Dear George:

I delayed writing to you until today thinking that because of your recent negotiations with Bruce, it was proper for

* Identified as P-74 on depositions herein.

him to tell you that Eastman, Dillon & Company considered it unwise to offer publicly the Houde Engineering Company financing at this time.

I regret exceedingly that our decision was delayed, but can assure you that we arrived at this conclusion after a great deal of very careful thought. As I have told you many times, this financing was of a great deal of interest to us, but at the same time I could not bring my associates to feel that we were justified in offering the stock in view of the short earning record and because of unsettled market conditions.

As a result of some earlier negotiations in connection with the option, I find a continuing interest on the part of an individual with whom you may wish to discuss the matter. I, of course, do not know of the negotiations you have on at the present time, but if you are interested I will be glad to put you in touch with my people. I presume that you and Bruce have decided upon an equitable and satisfactory division of the commission derived from the sale of the property.

With kind personal regards, I am

Yours very truly,

GEORGE

GNB:EM

[Plaintiffs'] Exhibit P-75.*

(Received in evidence 11/18/40, R. 975)

Letterhead of

MANUFACTURERS & TRADERS-PEOPLES TRUST COMPANY
Buffalo, New York

* Bears exhibit mark in previous litigation, and identified as P-75 on depositions herein.

November
1st, 1928

Mr. George N. Buffington,
Eastman, Dillon and Company,
Chicago, Illinois.

Dear George:

I am in receipt of your letter today, and was, of course, personally sorry after all the time and effort you, and Bruce, and I, put on this situation together that we did not have the satisfaction of seeing it take concrete public form.

As a matter of fact, everybody here, with the possible exception of myself, was better pleased that no public financing was done, and Mr. Cooley has associated a few individuals with him in the ownership of the property, and he and Mr. Shultz will continue to run it just as planned.

In regard to your reference to an individual who may wish to continue discussing the company, I, of course, don't know who, or what, you have in mind, but everybody is at anytime willing to listen, and if you care to put anybody who is interested in the property in touch with me, I will be very glad to visit with them.

I enjoyed thoroughly working with you on this transaction even though it was not consummated, and hope that we may do something on another one together some day soon.

With kind regards.

Sincerely,

GEORGE

GPR:GW.

[Plaintiffs'] Exhibit P-77.*

(Received in evidence 11/18/40, R. 975)

Letterhead of
EASTMAN, DILLON & Co.
Chicago, Illinois

November 2, 1928

Mr. George P. Rea, Vice-President,
MANUFACTURERS AND TRADERS PEOPLES TRUST CO.,
Buffalo, New York.

Dear George:

I wired you this afternoon telling you of my conversation with Mr. Claire Barnes of the Oakes Products Company. For several reasons which I will not explain to you now, I believe that it may be possible to work out a plan satisfactory to you and Mr. Cooley.

I have suggested to Mr. Barnes that he and his Detroit bankers, who happen to be Harris, Small, get in touch with you, and I understand that both of these gentlemen are very close to Edsel Ford. Mr. Barnes may be out of town next week, but in any event I understand that someone from Harris, Small's office will come to see you.

I will naturally be interested in knowing of any progress which is made.

With kindest regards, I am

Yours very truly,

GEORGE BUFFINGTON

GNB:EM

* Identified as Ex. P-77 on depositions herein.

[Defendants'] Exhibit P-78.*

(Received in evidence 11/19/40, R. 986)

November 2, 1928

Mr. Claire Barnes,
Oakes Products Company,
6201 Woodward Avenue,
Detroit, Michigan.

Dear Mr. Barnes:

As I told you confidentially this morning, Mr. Cooley, President of the New York Car Wheel Company, purchased the Houde Engineering Company for \$4,000,000 plus accrued earnings from August 31 to October 10th. The transaction involved approximately \$4,237,000 plus expenses.

I understand that he has taken into a syndicate a small group which includes one or two of the officers of the Manufacturers and Traders Peoples Trust Company of Buffalo. I do not know all of the details, but understand that at the present time all of the stock of the Houde Engineering Company is tied up in a voting trusteeship which is controlled by three individuals.

We had negotiations with the Company to provide for financing out a part of the purchase price, but for reasons which I told you about this morning, nothing was concluded and so far as I know it is the intention of Mr. Cooley and his associates to operate the business at the present time. I believe that it may be possible to work out a deal whereby Mr. Cooley and his associates would take stock in another Company properly financed for their present holdings in the Houde Company.

* Bears exhibit mark in previous litigation, and identified as Ex. P-78 on depositions herein.

I believe that our interest might best be served if you would give Harris, Small & Company the facts as I have outlined them to you and suggest that they contact with Mr. George P. Rea, Vice-President of the Manufacturers and Traders Peoples Trust Company, with whom we had our negotiations.

As I told you this morning, there are two weaknesses in this situation which we did not like. One is the Ford contract and the other fact, which I would not like to disclose to Mr. Rea, is that the management at the present time is not adequate in our judgment to insure an increasing volume of business. I am sure that it would be unwise in the original instance to disclose any concern on our part about the Ford business as I believe that this is a subsequent step.

In disclosing this information to you, I understand that in the event a deal is consummated Eastman, Dillon & Company, Harris, Small & Company and Paul H. Davis & Company will have an equal interest in the financing.

If there is any other information which you are unable to secure from the people in Buffalo, I would suggest that you get in touch with me.

Yours very truly,

GNB:EM

[Defendants'] Exhibit D-28.*

(Received in evidence 10/30/40, R. 435)

We, the undersigned, Directors of HOUDE ENGINEERING CORPORATION, hereby waive notice of the time and place of a special meeting of the Board of Directors of said Cor-

* Identified as Ex. D-28 on depositions herein.

poration, to be held at the Manufacturers & Traders-Peoples Trust Company, 284 Main Street, in the City of Buffalo, N. Y., on November 7th, 1928, at one o'clock P. M. to consider and act upon the resignation of certain directors and officers, and to elect their successors, and to transact any and all business which may be transacted at a regularly called meeting of the Board of Directors, and we hereby ratify and confirm any and all action which may be taken at such meeting.

Dated, Buffalo, N. Y., November 7th, 1928.

H. L. CHISHOLM

B. D. SHULTZ

A. B. SHULTZ

J. N. SCULLY

G. H. CHISHOLM

Minutes of a meeting of the Board of Directors of HOUBE ENGINEERING CORPORATION, held at the office of the Manufacturers & Traders-People Trust Company, No. 284 Main Street, in the City of Buffalo, N. Y., on the 7th day of November, 1928, at one o'clock P. M., pursuant to a written waiver of the time and place of holding of said meeting, signed by all of the Directors, which waiver appears in the minute book immediately preceding the minutes of this meeting.

There were present the following directors: Messrs. A. B. Shultz, Harry Chisholm and B. D. Shultz.

The meeting was called to order by the President, Mr. A. B. Shultz.

On motion duly made, seconded and unanimously carried, Perry E. Wurst was appointed Acting Secretary of this meeting.

The resignation of Mr. J. N. Scully as Vice President and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried, Mr. Fred B. Cooley was elected a Director to succeed Mr. Scully.

Mr. Cooley, being present, immediately accepted the office and took part in the further proceedings of the meeting.

The resignation of Mr. George H. Chisholm as Vice President and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried, Mr. L. G. Harriman was elected a Director to succeed Mr. Chisholm.

Mr. Harriman, being present, immediately accepted the office and took part in the further proceedings of the meeting.

The resignation of Mr. Harry Chisholm as Treasurer and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried Mr. H. G. Jackson was elected a Director to succeed Mr. Chisholm.

The resignation of Mr. B. D. Shultz as Secretary and Director was presented, and on motion duly made, seconded and unanimously carried, the resignation was accepted.

On motion duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLVED, that the office of Chairman of the Board be created, and that the Chairman of the Board shall be the chief executive officer of the Corporation, and that the By-Laws be amended accordingly.

Mr. F. B. Cooley, as sole stockholder of record of the corporation was present, and assented to such an amendment to the By-Laws.

On motion duly made, seconded and unanimously carried, Mr. F. B. Cooley was elected Chairman of the Board.

On motion duly made, seconded and unanimously carried, Mr. Ralph R. Hull was elected Treasurer of the Corporation.

On motion duly made, seconded and unanimously carried, Mr. L. G. Harriman was elected Secretary of the Corporation.

There being no further business to come before the meeting, it was, on motion duly made, seconded and unanimously carried, adjourned.

PERRY E. WURST,
Acting Secretary.

[Plaintiffs'] Exhibit P-421.*

(Received in evidence 11/18/40, R. 974)

November 10-1928

Mr. George Rea,
Manufacturers & Traders Peoples Trust Co.,
Buffalo, N. Y.

My dear George:

As I wired you day before yesterday, Messrs. Clair Barnes and Allington, both of Detroit, will stop in your office Tuesday morning of next week to discuss the Houde situation.

* Identified as Ex. P-421 on depositions herein.

As I previously told you, I had some negotiations under way with Mr. Barnes at the time you completed sale of the Houde Company to Mr. Cooley and associates. It is my judgment that Mr. Barnes is a very logical purchaser of this company, and while I have no specific suggestions to make to you regarding the meeting next week, I do feel that you should seriously consider the advantages which are apparent to me in working out a deal which would involve Clair Barnes.

They are coming to Buffalo, I believe, with no plans definitely worked out, but I feel confident that they are sufficiently interested in the situation to warrant you and Mr. Cooley giving them a very clear picture of the Houde situation.

As I told you over the telephone last week, the main reason we could not get together on our previous deal was the fact that the syndicate members, with the exception of Eastman, Dillon & Co. were not primarily distributors. This fact, together with Mr. Barnes' position in the automotive industry, in my judgment is important, and while I am not attempting to negotiate this business for you, I wanted to pass these comments on for what they may be worth.

With kind personal regards, I am

Yours very truly,

GNB:S

[Defendants'] Exhibit P-193a.*

(Received in evidence 11/27/40, R. 1164.)

November
14th, 1928.Mr. A. B. Shultz,
537 East Delavan Ave.,
Buffalo, N. Y.

Dear Sir:

We are pleased to advise you that with the approval of Mr. Cooley you have been allotted a participation to the extent of Two Hundred Fifty Thousand Dollars (\$250,000) in the Syndicate to purchase the entire outstanding capital stock of Houde Engineering Corporation. It is possible, in view of the fact that allotments could not be allowed in full of the amount subscribed, that a new participation agreement will be necessary, and that you will be asked to subscribe to the new agreement for the amount allotted you.

The Syndicate has been formed in the amount of \$4,250,000, which it is believed will somewhat more than cover the amount of the purchase price with accruals. If there is any surplus, this will be used to cover carrying charges.

In the near future you will be asked to forward a payment of 25% on your subscription, plus an additional 5% to cover carrying charges. In the meantime, Mr. Cooley will continue to carry the stock.

Very truly yours,

FRED B. COOLEY

RALPH HOCHSTETTER

LEWIS G. HARRIMAN,

Syndicate Managers.

* Carbon copy of one of letters addressed by Syndicate Managers to Syndicate participants all of which were marked Ex. P-193 on depositions herein. See stipulation in transcript of record, page 1164.

[Defendants'] Exhibit P-85.*
(Received in evidence 11/15/40, R. 954)

November
20th, 1928

Central Trust Company of Illinois,
Chicago, Illinois,

Attention Mr. Alexander:

Gentlemen:

Enclosed herewith we hand you our check for \$15,000, coming out of our remuneration in connection with the sale of Houde Engineering Corporation stock to the New York Car Wheel Company.

As it worked out both the negotiating of the option itself, and the sale of the property were consummated by the Manufacturers & Traders-Peoples Trust Company, but we wish to forward this amount to you in recognition of your continued, courteous, and helpful attitude in connection with this matter.

Yours Very Truly,

Vice President.

GPR:GW

Enc.

* Identified as Ex. P-85 on depositions herein.

[Plaintiffs'] Exhibit P-86.*
(Received in evidence 11/19/40, R. 990)

Letterhead of

MANUFACTURERS & TRADERS—PEOPLES TRUST COMPANY
Buffalo, New York

November
20th, 1928

* Bears exhibit mark in previous litigation, and identified as Ex. P-86 on depositions herein.

Eastman, Dillon and Company,
Chicago, Illinois.

Attention Mr. George Buffington:

Gentlemen:

We are pleased to enclose our check for \$15,000, which we are handing you out of our commission for the sale of the Houde Engineering Corporation stock to the New York Car Wheel Company.

We are doing this not because we feel obligated to do it, but in appreciation of the efforts you made to find a purchaser for this stock, even though, as it worked out, the Manufacturers & Traders-Peoples Trust Company procured the option, and also the purchaser.

With respect to the suggestion which you made that in case of a resale of the stock presently, you feel you are entitled to some further consideration, I beg to say I talked this over with Mr. Harriman, and other members of the purchasing syndicate, and they feel that in view of the fact that there was no intention to resell the stock, as they intended to operate the company for sometime, that when a prospective purchaser appeared it was made clear to them that the price quoted them was net, and did not involve payment of any commissions, or other fees to anyone, that they cannot consider any question of a division of any part of the profit.

I trust you will feel that we have been generous in connection with the matter.

Yours very truly,

GEORGE P. REA
Vice President.

GPR:GW
11-a—WOOD
Enc.

[Defendants'] Exhibit D-41.*
(Received in evidence 10/31/40, R. 492)

December
5th, 1928.

Mr. A. B. Shultz,
557 East Delavan Ave.,
Buffalo, N. Y.

Dear Sir:

The Syndicate organized for the purpose of purchasing from Fred B. Cooley the outstanding stock of Houde Engineering Corporation, in which you were allotted a participation to the amount of \$250,000, has been closed.

No payment was called on your participation for the reason that Mr. Cooley did not require immediate payment, and the stock has now been sold for the sum of \$6,000,000 in cash.

The cost of the stock was \$4,000,000, plus accrued earnings from August 31st to the date the option was exercised, amounting to \$210,611.02, making the total cost, \$4,210,611.02. To this sum is added interest charges, auditors' fees, attorney fees and other expenses, amounting to \$45,561.43, making the cost plus carrying charges and expenses the sum of \$4,256,972.45. Deducting this amount from the sale price leaves a profit of \$1,744,027.55.

By the terms of the underwriting agreement Mr. Cooley receives 25% of this sum which amounts to \$436,006.88, leaving a net profit to the Syndicate of \$1,308,020.67, or 30.7769589 per cent of \$4,250,000, the total amount of the purchase syndicate.

* Carbon copy of one of letters addressed by Syndicate Managers to Syndicate participants all of which were marked Ex. P-194 on depositions herein. See stipulation in transcript of record, page 492.

Your portion is the sum of \$76,942.39, for which amount the Syndicate Managers' check is enclosed herewith.

Very truly yours,

FRED B. COOLEY,
L. G. HARRIMAN
RALPH HOCHSTETTER,
Syndicate Managers.

[Defendants'] Exhibit D-36.*

(Received in evidence 10/31/40, R. 1592)

COPY

Letterhead of
HARRIS, SMALL & Co.
Detroit

The original of this letter (with enclosures other than securities) is being mailed under separate cover. Please verify all securities, and if found correct, sign and return this copy as a receipt. No other acknowledgment is necessary.

December 5, 1928

Mr. A. B. Schultz,
c/o Houdaille Corporation,
Buffalo, N. Y.

Dear Sir:

We are forwarding you today through the Manufacturers and Traders Peoples Trust Company—

1,000 UNITS HOUDAILLE CORPORATION STOCK
with draft attached for \$66,000.00.

* See stipulation in transcript of record, pages 436, 2193.

Kindly honor the draft upon presentation.

Yours very truly,

HARRIS, SMALL & Co.

By

Cashier.

FJO:JM

Received from Harris, Small & Co., Detroit, the securities described and enumerated above.

Date Dec. 5, 1928.

A. B. SHULTZ
signature

[Defendants'] Exhibit D-33.

(Received in evidence 10/31/40, R. 418)

SUPREME COURT—ERIE COUNTY

BYRON D. SCHULTZ,

Plaintiff,

vs.

MANUFACTURERS & TRADERS TRUST
COMPANY,

Defendant.

For cause of action herein, this plaintiff, by Albrecht, Maguire & Mills, his attorneys, alleges upon information and belief:

FIRST: That the defendant is and was, at all of the times hereinafter mentioned, a domestic corporation duly incorporated under the laws of the State of New York; and now is and at all times hereinafter mentioned, was engaged in banking business in the City of Buffalo, New York.

SECOND: That, on September 26th, 1928, this plaintiff was the owner of two hundred eighty one and one-fourth ($281\frac{1}{4}$) shares of the capital stock of Houde Engineering Corporation, a New York State Corporation.

THIRD: That, on said September 26th, 1928, this plaintiff and other stockholders representing substantially all of the capital stock of said Houde Engineering Corporation issued and outstanding, entered into an agreement with the defendant through Krauss & Company, its duly authorized agent and representative, whereby this plaintiff and said other stockholders gave to the defendant, through said Krauss & Company, the right to sell within thirty days from the date thereof, all of the stock of said Houde Engineering Corporation, for the sum of Four Million Dollars, (\$4,000,000.00), plus any accrual in net assets of said Houde Engineering Corporation after August 31st, 1928, and the defendant through its agent and representative, agreed to act as broker for this plaintiff and said other stockholders in said transaction and, in the event of a sale of said stock being consummated, this plaintiff and said other stockholders agreed to pay a commission of three per cent (3%) upon the selling price thereof.

FOURTH: That, in order to induce the plaintiff and said other stockholders to enter into said option and brokerage agreement, the defendant represented to and agreed with this plaintiff and said other stockholders that the said selling price of Four Million Dollars (\$4,000,000.00) plus accrued earnings, would be the minimum price at which the defendant, as broker, would endeavor to sell the said stock, and the defendant further promised that it would, if possible, negotiate a sale of the said stock for plaintiff and his fellow stockholders at a better and higher price than the minimum therein set out.

FIFTH: That, thereafter and between said September 26th, 1928, and October 11th, 1928, the General Motors Corporation made an offer to defendant to purchase the said stock at a sum in excess of the price set forth in said option and brokerage agreement, but, in violation of its promises and agreements aforesaid, and in further violation of its duty as broker for the plaintiff, the defendant did not accept such offer, nor did it inform this plaintiff of said offer or of said better price, but concealed said offer and the fact that it had been made from this plaintiff.

SIXTH: That, on October 11, 1928, this defendant, through Lewis G. Harriman, its President, and Perry E. Wurst, and George P. Rea, two of its Vice-Presidents, entered into an agreement with one Fred B. Cooley, President of the New York Car Wheel Company, in writing, which recited that New York Car Wheel Company was to become the purchaser of said stock, and thereupon agreed that a Syndicate should be formed, with the assistance of the officials of the defendant, to take over from the New York Car Wheel Company Three Million Five Hundred Thousand Dollars (\$3,500,000.00) of the total purchase price of Four Million Dollars (\$4,000,000.00) but that, in the event of the death or disability of said Cooley before the organization of said Syndicate, said Messrs. Harriman, Wurst and Rea would hold the said New York Car Wheel Company harmless from all its obligations to complete the purchase of the Houde Engineering Corporation stock, and in such event Messrs. Harriman, Wurst and Rea should succeed to all the rights of said New York Car Wheel Company to purchase said stock.

SEVENTH: That, on the same day, viz.: October 11, 1928, the defendant, through its said agent, advised this plaintiff and said other stockholders, in writing, that the New York Car Wheel Company of Buffalo had agreed to purchase the said stock upon the terms of the said brokerage agreement

and had made available in the hands of the defendant the sum of Four Million Dollars (\$4,000,000) therefor and called upon the plaintiff and said stockholders for the delivery of the said stock prior to October 25, 1928.

EIGHTH: That the defendant, in violation of its trust, failed and neglected to inform and advise this plaintiff that it had an interest in the purchase of the said stock and that it had agreed to become a purchaser of all or of part of the said stock and this plaintiff was led by the defendant to believe and did believe, that the said New York Car Wheel Company was purchasing the same wholly for its own account and in its own interest.

NINTH: That plaintiff, believing that the New York Car Wheel Company was the purchaser of said stock and unaware that the defendant was making a secret and undisclosed profit on said sale delivered to the defendant Two Hundred Eighty One and One Fourth ($281\frac{1}{4}$) shares of said stock and received therefor the sum of Four Hundred Eighty Five Thousand, Five Hundred Ninety Dollars and Seventy One Cents (\$485,590.71) and no more.

TENTH: That as plaintiff is now informed and verily believes, all of the foregoing were parts of and were in furtherance of a plan and scheme by this defendant wrongfully and secretly to make a secret and undisclosed profit out of the said transaction; and in further pursuance of said plan, this defendant did thereafter form a Syndicate in which the defendant allotted participations to itself, to a subsidiary, and to certain of its executive officers, directors and to others, and through and by means of which Syndicate, without any of the members or participants being called upon to contribute any funds whatever, this defendant did thereafter sell all of said stock for the sum of Six Million Dollars (\$6,000,000.00) and, in addition, this defendant collected from this plaintiff and said stockholders the sum of One Hundred Twenty Six Thousand Three Hun-

dred Eighteen Dollars and Thirty Three Cents (\$126,318.33) as its commission as broker for the plaintiff and his fellow stockholders in the sale of said stock, and the plaintiff paid to the defendant, on account of said commission, the sum of Fourteen Thousand Five Hundred Sixty Seven Dollars and Seventy-One Cents (\$14,567.71).

ELEVENTH: That in addition to the commission of Fourteen Thousand Five Hundred Sixty Seven Dollars and seventy-one cents (\$14,567.71), the defendant made a concealed and secret profit on the sale of plaintiff's stock in the sum of Two Hundred Six Thousand Three Hundred Sixty-two Dollars and twelve cents (\$206,362.12).

TWELFTH: That this plaintiff relied upon the statements of the defendant made to him as aforesaid and believed them and believed that the defendant was in good faith representing only the interests of this plaintiff and his fellow stockholders in said transaction, and was unaware of the facts as hereinbefore alleged until long after the delivery of the said stock and has only recently learned of the facts as herein set forth.

THIRTEENTH: That by reason of the premises aforesaid plaintiff has been damaged in the sum of Two Hundred Twenty Thousand Nine Hundred Twenty Nine Dollars and eighty three cents (\$220,929.83).

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Two Hundred Twenty Thousand, Nine Hundred Twenty Nine Dollars and eighty three cents (\$220,929.83) with interest thereon from the 24th day of October, 1928, together with the costs and disbursements of this action.

ALBRECHT, MAGUIRE & MILLS
Attorneys for Plaintiff
 Office & P. O. Address
 1300 Genesee Building,
 Buffalo, New York

STATE OF NEW YORK	} ss. :
COUNTY OF ERIE	
CITY OF BUFFALO	

BYRON D. SCHULTZ, being duly sworn deposes and says that he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BYRON D. SCHULTZ

Sworn to before me this
 2nd day of November, 1934.
 PEARL L. CANDEE
 Notary Public, Erie County, N. Y.